Supreme Court, U.S.
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In The

Supreme Court Of The United States

SOPHAL PHON,
Petitioner

v.

COMMONWEALTH OF KENTUCKY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner, a juvenile under the age of eighteen at the time of his offense, is entitled to a new sentencing hearing in light of *Roper v. Simmons,* given that his original sentencing was premised on the theory that the death penalty was permissible and as such, the jury was instructed on the mitigating sentence of life without parole, which was an otherwise inapplicable sentence?

II. In light of *Roper v. Simmons,* the evolving standards of decency in this country and overwhelming international opinion, does the sentence of life imprisonment without the possibility of parole constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

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OPINIONS OF THE LOWER COURTS

Petitioner initially moved the Warren Circuit Court, in Action No. 96-CR-00599-005, to consider the issues presented herein on February 17, 2006 with his Motion to Grant New Sentencing Hearing Pursuant to CR 60.02(e) & (f) & RCr 11.42. The motion is reprinted in the appendix at A20.

The Warren Circuit Court, Honorable John R. Grise presiding, denied the motion with an order entered on November 16, 2006. The order is reprinted in the appendix at A11.

Petitioner then appealed. The decision of the Kentucky Court of Appeals, *Sophal Phon v. Commonwealth*, Action No. 2006-CA-002456, affirming the Warren Circuit Court is reprinted at Petitioner's Appendix, A2.

Petitioner sought discretionary review in the Kentucky Supreme Court. The order denying discretionary review of the Kentucky Supreme Court, Action No. 2008-SC-000250-D, entered December 10, 2008, is reprinted at Pet. Apx. A1.

JURISDICTION

The Kentucky Court of Appeals' opinion was entered March 7, 2008. The Kentucky Supreme Court's order denying discretionary review was entered December 10, 2008 . Petitioner's request for an extension of time in which to file this Petition for Writ of Certiorari was granted on August 10, 2005 extending the time in which to file the instant petition to and including October 7, 2005.The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

Kentucky Rule of Criminal Procedure 11.42 provides in relevant part: "A prisoner in custody under

sentence...who claims...that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it."

Kentucky Civil Rule 60.02 (e) and (f) provide, in pertinent part: "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief."

STATEMENT OF THE CASE

Petitioner Sophal Phon is one of five co-defendants indicted for the August 17, 1996 murder, robbery and burglary which occurred in Warren County, Kentucky. At the time of the crimes, Sophal Phon was sixteen-years-old.[1] The Commonwealth sought the death penalty for four of the five co-defendants, including Phon.

On July 7, 1998, Sophal Phon entered a guilty plea to the charges with respect to guilt. Phon was not motivated to enter his plea by any offer from the Commonwealth. There were no promises or agreements between Phon and the prosecution regarding a recommended sentence. Rather the parties proceeded to a jury trial, with the sole issue of what sentence to impose.

At the time of the commission of the crimes, life without parole was not a permissible sentence for Phon. After the commission of the crimes, but prior to his trial, the Kentucky General Assembly enacted a crime bill, HB 455, which added life without parole as a sentencing option for those convicted of capital crimes. *See Commonwealth v. Phon*, 17 S.W.3d 106, 107 (Ky. 2000). The new sentence option became effective on July 15, 1998. On June 24, 1998, the Commonwealth moved to exclude life without parole from retrospective application as a sentencing option available to the jury for the five co-defendants in Phon's case. The trial court denied the Commonwealth's motion to exclude this sentence,

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[1] Though the indictment lists Sophal Phon's date of birth as February 12, 1979, testimony by Sophal's sister and mother during the penalty phase of the trial established that he was actually born on September 28, 1979. Thus, he was sixteen-years-old when he committed the crimes.

but made clear that life without parole would be a sentencing option only with the accused's consent. *Id.*

Kentucky's Attorney General then sought certification of the law, arguing that the new sentence option should not be available for capital crimes committed before the effective date of the new law, July 15, 1998, because life without parole did not mitigate the death penalty. *Commonwealth v. Phon,* 17 S.W.3d at 107-08. The Kentucky Supreme Court disagreed, holding that "[l]ife without parole is a lesser penalty than death because it allows a convicted defendant continued survival, albeit with severely limited individual liberties, rather than the termination of his life." *Id.*, 17 S.W.3d at 107. Under Kentucky Revised Statute 446.110 mitigating provisions of new laws may be applied retroactively with the unqualified consent of the affected party. *Id.*, 17 S.W.3d at 107-08.

In an attempt to avoid the death penalty, Sophal Phon elected to have life without parole included in the sentencing options for the jury. Along with his admission of guilt, the decision to include this punishment option was part of an overall trial strategy intended to convince the jury to spare his life. *Phon v. Commonwealth,* 51 S.W.3d 456, 460 (Ky. App. 2001).

Specifically, the defense theory in mitigation of the death penalty was that Sophal Phon was forced to participate in the crimes by the older members of the gang. Phon, at sixteen, was one of the two youngest members of the gang. The other co-defendants ranged in age from twenty to twenty-five. Phon was ordered to shoot the victims by Outh

Sananikone, the oldest member of the gang. Phon complied with the order because he believed that if he failed to shoot the victims as instructed, he and his family would be killed by Sananikone-the orchestrator of the robbery/burglary which culminated in the victims' deaths. In addition to the undue influence of the older gang members, Phon's defense in mitigation of the death penalty included descriptions of his exposure to poverty, death and brutality during his formative years-from his birth in Cambodia to his stay in a Thai refugee camp until age seven. Additionally, the jury was told about Phon's low IQ, family circumstances and difficulty adjusting to American culture. Finally, the jury was told of Phon's redeeming qualities, including the time he saved two young girls from drowning, only to find that his efforts to save the girls had prevented him from saving the life of his only living brother.

The trial strategy to avoid the death penalty worked. The jury recommended the sentence of life without the possibility of parole on both counts of capital murder. The Commonwealth filed a "Motion for Court to Impose the Death Penalty Despite Jury's Verdict of Life Imprisonment", but the trial court overruled the motion and sentenced Phon consistent with the jury's recommendation.

In 2005, this Court handed down the decision in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) holding that the death penalty constitutes cruel and unusual punishment for offenders who were under the age of eighteen when their crimes were committed.

In light of *Roper,* Sophal Phon sought a new sentencing hearing in Warren Circuit Court pursuant to Kentucky Rule of Criminal Procedure 11.42 and Civil Rule 60.02(e) & (f). Kentucky Rule of Criminal Procedure 11.42 provides that a "prisoner in custody under sentence...who claims...that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it." Kentucky Civil Rule 60.02 (e) and (f) provide, in pertinent part:

> "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application;* or (f) *any other reason of an extraordinary nature justifying relief."*

(Emphasis added).

In his motion of February 20, 2006, Phon argued, in relevant part, that his sentence of life without parole must be vacated because it is no longer a mitigating sentence in light of the *Roper* decision and that life without parole was an unconstitutional punishment for a sixteen-year-old offender.

On November 16, 2006, the Warren Circuit Court denied Sophal's motion. Initially the court found that it did have jurisdiction to consider the claims raised

by Phon under the procedural rules cited by Phon. Order Denying Defendant's Motion for a New Sentencing Hearing, Warren Circuit Court, Action No. 96-CR-00599-005 (November 16, 2006), p. 2-3. The trial court found that the reasoning of *Roper* did not apply to Phon's case because he had not received the death penalty. The court found that seven years prior to the *Roper* decision the jury had already properly considered Phon's youth as a mitigating factor and that is why they did not sentence him to death.

Phon then appealed to the Kentucky Court of Appeals. He argued on appeal that his sentence of life without parole should be set aside because it was no longer a mitigating sentence in light of *Roper*.

The Kentucky Court of Appeals affirmed the circuit court's ruling in a decision entered March 7, 2008. The court held that *Roper* did not apply retroactively to Sophal because he had not been sentenced to death. The court concluded

> "Just as Phon cannot now change his guilty plea because the maximum penalty would no longer apply, he cannot now obtain a new sentencing hearing simply because the maximum penalty would no longer apply."

Phon v. Commonwealth, No. 2006-CA-002456-MR (March 7, 2008), p. 7.

Sophal sought discretionary review of this decision with the Kentucky Supreme Court. On December 15, 2008, the Kentucky Supreme Court denied discretionary review.

REASONS FOR GRANTING THE WRIT

This case raise the two important questions stemming from this Court's ruling in *Roper v. Simmons*, 543 U.S. 551 (2005) that the death penalty constitutes cruel and unusual punishment for juvenile offenders who were under the age of eighteen at the time of the offense.

First, this writ should be granted to assure the retroactive application of *Roper v. Simmons* to a situation in which a juvenile offender was sentenced to life without parole, a sentence which was unavailable except for the fact that the prosecution was seeking the death penalty and life without parole was made available as a mitigating sentence. Had the Commonwealth not sought the death penalty, the sentence of life without parole would not have been a permissible punishment and Petitioner would have been eligible for parole. Second, this case allows this Court to address the issue of whether in light of evolving standards of decency in this country, and overwhelming international opinion, the sentence of life without the possibility of parole for juveniles constitutes cruel and unusual punishment in violation of the Eighth Amendment.

I. PETITIONER, A JUVENILE UNDER THE AGE OF 18 AT THE TIME OF HIS OFFENSE, IS ENTITLED TO A NEW SENTENCING HEARING IN LIGHT OF *ROPER V. SIMMONS* BECAUSE HIS LIFE WITHOUT PAROLE SENTENCE WAS AVAILABLE ONLY AS A MITIGATING SENTENCE FOR THE DEATH PENALTY.

A. Retroactive Application of *Roper* Requires Resentencing Because Phon's Life Without Parole Sentence was Only Available as a Mitigating Sentence for the Death Penalty.

Sophal Phon was sentenced to life without parole only because he faced the death penalty at trial. Otherwise, life without parole was not available as a sentence. Phon faced the death penalty at trial, and in attempt to avoid this possible penalty, he consented to the inclusion of the sentence of life without parole as one of the potential sentences available to the jury. At the time, life without parole was not a sentencing option under Kentucky law. *Commonwealth v. Phon*, *supra*, 17 S.W.3d. at 107-08; KRS 532.030. Life without parole was deemed available as a mitigating sentence for the death penalty only if the defendant consented to its inclusion as an option for the jury. *See Commonwealth v. Phon,* 17 S.W.3d at 108. Phon consented to its inclusion solely in an attempt to avoid the death penalty for a crime he committed while a juvenile.

Recently, the Kentucky Supreme Court has ruled that life without parole is not a permissible sentence for a juvenile under the age of eighteen at the time of his offense. *Shepherd v. Commonwealth,* 251 S.W.3d 309 (2008). The Kentucky Supreme Court found that while life without parole is a permissible sentence under the adult sentencing statute, KRS 532.030(1), the sentencing of a youthful offender is governed by KRS 640.040(1), which does not include life without parole as an option. *Shepherd,* 251 S.W.3d at 309.

In *Roper v. Simmons* this Court ruled that it was unconstitutional to impose a death sentence on a juvenile offender who was less than eighteen years of age at the time he committed a capital crime. 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The *Roper* decision recognized that youth was not merely a mitigating factor to be considered by the jury deciding whether to impose death. *Id.*, 543 U.S. at 568-571. Rather, this Court held the diminished culpability of juveniles under the age of eighteen places them squarely within a class of offenders who are not deserving of capital punishment. *Id.*

In light of the *Roper* decision, Phon's sentence of life without parole is no longer valid and must be vacated. Under *Roper,* Phon is not eligible for the death penalty because he was sixteen-years-old at the time of the offense. While Phon was not sentenced to death, he was sentenced to the next highest punishment, life without the possibility of parole. This was a sentence that he could never have received, under Kentucky law, except that at the time, he was eligible for the death penalty. Phon consented to the inclusion of life without parole as a possible punishment entirely in an effort to avoid the death penalty. Had the Commonwealth of Kentucky not sought to execute this juvenile, life without parole would have exceeded the maximum penalty available for these crimes and Phon would not have been permitted to consent to its inclusion as a mitigator of the death penalty. The maximum penalty available to the jury without the state's seeking the death penalty would have made Phon eligible for parole. KRS 532.030.

Life without parole was available only as a mitigating penalty because the Commonwealth sought the death penalty. In *Commonwealth v. Phon*, the Kentucky Supreme Court held that Phon could consent to life without parole only because Kentucky Revised Statute 446.110 "allows mitigating provisions of new laws to be applied retroactively if the affected party consents." 17 S.W.3d at 107. Kentucky's highest court refuted the Commonwealth's contention that life without parole is not a mitigating penalty for the death penalty. The Court quoted Justice Holmes from *Biddle v. Perovich*, "By common understanding, imprisonment for life is a less penalty than death." 274 U.S. 480, 486, 47 S.Ct. 664, 665, 71 L.Ed. 1161 (1927). The Kentucky court concluded that life without parole is certainly and definitely a mitigating punishment available only by consent of Phon "because it allows a convicted defendant continued survival, albeit with severely limited individual liberties, rather than the termination of his life." 117 S.W.3d at 108.

In Phon's underlying motion for a new sentencing hearing in the Kentucky courts, the Commonwealth and the trial court rejected Phon's argument that he would not have subjected himself to life without parole if the death penalty had not been sought. This finding is completely without support in either logic or the prior law of this case. The Kentucky Court of Appeals had previously found Sophal Phon consented to the inclusion of the life without parole penalty only in an attempt to induce the jury to spare his life. *See Phon v. Commonwealth*, 51 S.W.3d 456, 460 (Ky. App. 2001). In considering the issue *sub judice*, the

Kentucky Court of Appeals found "Phon also opted to include the sentence of life without parole in the jury instructions. We note that Phon was not motivated to enter into this plea by any offers or promises by the Commonwealth. The primary factor motivating Phon was avoidance of the death penalty, which his attorney believed could best be accomplished by a guilty plea and reliance on the mercy of a jury." *Phon v. Commonwealth,* No. 2006-CA-002456-MR (March 7, 2008), p. 3.

Further evidence of the soundness of Phon's strategy to allow the inclusion of life without parole as a mitigator of the death penalty can be found in the jury's verdict. The strategy worked-the jury spared his life, instead recommending life without parole.

Had the Commonwealth not sought the death penalty, Phon certainly would not have consented to the inclusion of life without parole in the sentencing options. Notwithstanding the death penalty, life without parole is a harsher sentence than any of the other sentencing options. It exceeds the maximum penalty available in homicides where the death penalty is not an option. No other reason exists for Phon to consent to its inclusion than in an attempt to provide an option which would entice the jury to save his life.

Initially, the Commonwealth had argued that Phon was not entitled to have a jury consider the sentence of life without parole, claiming the penalty was not a mitigating sentence that could be applied retroactively. *Commonwealth v. Phon,* 17 S.W.3d at 106-07. The Kentucky Supreme Court rejected this

argument, finding that a life without parole sentence could only be considered in Phon's case because it was in mitigation of the death penalty. *Id.*, 17 S.W.3d at 108.

In an earlier decision concerning Phon, the Kentucky Supreme Court recognized the reasonableness of defense counsel's decision to include life without parole in an attempt to avoid the death penalty. In 1998, Phon filed a claim for ineffective assistance of counsel asserting that his trial counsel never explained to him that the sentence of life without parole did not have to be included as an option for the jury and that its inclusion along with an open plea of guilty without an agreement was ineffective. *See Phon v. Commonwealth,* 51 S.W.3d at 458-60. The Kentucky Court of Appeals rejected this argument and found that Phon had consented to the inclusion of life without parole and "[by] giving the jury an opportunity to sentence Phon to life without parole, [trial counsel] was hoping to spare his client from the death penalty....[T]rial counsel's performance did not fall below an objective standard of reasonableness." *Id.*, 51 S.W.3d at 459. No other reason exists for consenting to the inclusion of life without parole as a sentencing option.

Once the *Roper* decision invalidated death as a constitutional punishment for juvenile under the age of eighteen at the time of the offense, the constitutionality of Phon's life without parole sentence, available only as a mitigating sentence to the death penalty, was necessarily called into question. *Roper* should be interpreted to invalidate

mitigating sentences available only because the state sought an unconstitutional death penalty against a juvenile.

At issue here is the breadth of the retroactivity of the *Roper* decision. The Kentucky Court of Appeals rejected the argument that the *Roper* decision applied retroactively in this case because Phon did not actually receive a death sentence. The scope of the *Roper* decision should not be so limited. *Roper* should also be applied retroactively to invalidate a lesser penalty that is only available as a mitigating sentence due to the state seeking the death penalty against a juvenile.

There are two exceptions to the general rule against retroactive application of laws in cases of collateral review of criminal convictions. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). First, a new rule is applied retroactively on collateral review when the rule finds that the conduct does not fall within "the power of the criminal lawmaking authority to proscribe." *Id.*, 489 U.S. at 311. Second, a new rule is applied retroactively if the procedure not only implicates fundamental fairness but would also provide significant improvement or would ensure greater accuracy of the fact-finding process. *Id.*, 489 U.S. at 311-314.

This Court has indicated that a new rule such as the one in *Roper* falls within the first exception. In *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153

L.Ed.2d 335 (2002), this Court provided this example:

> "In our view, a new rule placing a certain class of individuals beyond the state's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."

Penry, 492 U.S. at 329-30. Under this rationale *Roper* should be applied retroactively.

Limiting *Roper* only to cases where the juvenile was actually sentenced to death creates bizarre and inequitable results. If Phon had actually been sentenced to death, *Roper* would entitle him to a new sentencing hearing in which the maximum sentence available would be less than the sentence he received when the jury declined to impose the death penalty. Most significantly, he would have been eligible for parole. If the underlying decision is allowed to stand, Phon will receive a much harsher sentence simply because the jury determined his offense did not merit the death penalty. Thus, he would have been better off now, and have a lighter sentence, if the jury or judge had chosen death as his punishment.

The Kentucky Court of Appeals based its decision not to grant a new sentencing hearing largely on *Brady v. United States*, 397 U.S. 742 (1970). The court held Phon cannot "disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions."

The *Brady* facts differ in a significant matter from those here. Brady plead guilty and bargained for the sentence that he received. Phon did not strike any bargain with the Commonwealth regarding his sentence. It was determined by a jury. There was no plea agreement between Phon and the government. Phon did not bargain for his sentence, rather, a jury selected it from what it believed were the legal sentencing options at the time. Although Phon initially consented to the inclusion of this sentencing option, he received no benefit for his consent. It was simply an attempt to avoid a death sentence that has now been determined to be unconstitutional due to his age.

South Carolina, unlike Kentucky, has recognized that *Roper* applies retroactively to require a new sentencing hearing for a juvenile who plead guilty to life without parole for twenty-five years. *State v. Morgan,* 626 S.E.2d 888 (S.C. 2006). In *Morgan*, the defendant was less than eighteen-years-old at the time of the offense for which he was sentenced to death. Following *Roper,* the South Carolina Supreme Court vacated his death sentence and remanded for a new sentencing proceeding. *Id.,* 626 S.E.2d at 618. The parties disagreed on the appropriate procedure for resentencing. The state argued Morgan should be sentenced to life imprisonment without parole because that is the only other available option after the jury found two aggravating circumstances. Morgan sought to argue that he should be sentenced to something less than life imprisonment without parole. The South Carolina Supreme Court recognized that *Roper* does not merely eliminate the

death sentence for a juvenile, but also requires that the juvenile offender be sentenced consistent with a person who is not subject to the death penalty. *Id.* Therefore, Morgan was permitted to present additional evidence and argument regarding which sentence he should receive from the range of sentences permitted when a death sentence is not permitted. *Id.*, 626 S.E.2d at 619. The court indicated that the finding of aggravators was irrelevant, because the defendant was no longer facing the death penalty and aggravators only applied to death penalty sentencing. Thus, South Carolina applied *Roper* not just to eliminate death sentences for juvenile offenders, but also to entitle them to procedures consistent with other defendants when the death penalty is not permitted. This differs considerably from Kentucky's application of *Roper* in the case *sub judice*. To deny Phon a sentencing consistent with Kentucky law and the *Roper* decision constitutes a denial of Due Process under the Fifth and Fourteenth Amendments.

This Court should grant certiorari in this matter not only to consider the validity of Petitioner's sentence, but also to address this split between state courts regarding the retroactive application of *Roper*.

B. The Jury Improperly Considered an Unconstitutional Punishment for a Sixteen-Year-Old Offender.

"It has long been settled that when a cases is submitted to the jury on alternative theories[,] the unconstitutionality of any of the theories requires that the conviction be set aside." *Leary v. United*

States, 395 U.S. 6, 32, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). The *Roper* case held that the potential for the death penalty is unconstitutional in cases where the defendant was a juvenile under the age of eighteen at the time of the offense. At trial, Sophal Phon's jury considered an unconstitutional sentence for Phon- death.

The Kentucky courts evaded this problem by creating a faulty distinction between *Leary* and the instant case. The Kentucky Court of Appeals held that *Leary* has no application here because "*Leary* addresses a faulty jury instruction involving alternative theories of conviction, not alternative theories of sentencing." *Phon v. Commonwealth*, 2006-CA-002456 (March 7, 2008), p. 5-6 (emphasis in original). This distinction fails to account for the importance of sentencing and the effect seeking the death penalty has upon trials and juries. The *Leary* rationale is the same applied to sentencing. When a jury is required to consider an unconstitutional punishment, it is impossible to determine to what extent that consideration affected the ultimate recommendation. The integrity of the jury's decision is called into question.

While the jury did not recommend a death sentence, they did consider the punishment. Both the judge and the jury are required to consider the full range of available penalties, so undoubtedly both considered an impermissible death sentence for Sophal. The effects upon the jury of considering this punishment cannot be measured or underestimated. No assurance exists that the jury considered the same factors as this Court did in *Roper*. Without

impeaching the jury's decision, there is no way to determine whether the jury properly considered the youth of the defendant and his categorically less culpable status. In fact, as this Court recognized in *Roper,* the potential exists that "a defendant's youth may even be counted against him" such that youth may be viewed as an aggravating factor rather than a mitigating factor during sentencing. *Roper,* 543 U.S. at 558, 572-73. Since the jury considered this unconstitutional punishment the sentence must be vacated as a violation of due process.

C. A Reasonable Likelihood Exists that the Jury Failed to Properly Consider Constitutionally Relevant Mitigation Evidence as Established in *Roper.*

There is a reasonable likelihood that the sentencing jury and court failed to properly consider constitutionally relevant evidence of mitigation-appellant's categorically less culpable status as recognized in *Roper.* 543 U.S. at 568. Under *Roper,* being under eighteen (18) when the crime is committed is no longer just one of many mitigating factors to be considered by a jury, but rather, the Constitution forbids even the possibility that a juvenile may be sentenced to death. *Id.* The Eighth and Fourteenth Amendments forbid execution of offenders who were under the age of eighteen when their crimes were committed because "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper,* 543 U.S. at

568 *quoting Atkins v. Virginia*, 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The *Roper* Court identified three general differences between juveniles under age of eighteen and adults that demonstrate "juvenile offenders cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569. First, "a lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions." *Id.* Second, "juveniles are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure," in part, because juveniles "have less control, or less experience with control, over their own environment." *Id.* Finally, "the character of a juvenile is not as well formed as that of an adult." *Id.*, 543 U.S. at 570. These three factors result in a categorically less culpable status for juvenile offenders under the age of eighteen that must be considered by all courts. *Id.*, 543 U.S. at 572-73.

In *Roper*, this Court rejected the prosecution's argument that a categorical rule was not necessary and adopting a rule to ensure that the mitigating force of youth is not overlooked would be sufficient. *Roper*, 543 U.S. at 572-73.

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments

> based on youth as a mater of course...In some cases a defendant's youth may even be counted against him."

Id. A rule that a jury must consider the factors concerning youth is not constitutionally sufficient, the jury must not consider imposing the death penalty on a juvenile offender under the age of eighteen.

The standard for reviewing claims that jury instructions restricted the jury's consideration of relevant mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

The trial court judge's finding, without evidentiary basis, concluding the jury must have considered the factors from *Roper* because it did not sentence him to death is faulty. It is impossible to determine why the jury decided against the death penalty or what they would have done had the death penalty not been an option. At trial, defense counsel presented the jury with a great deal of evidence in mitigation of the death penalty, much of which was not related to Sophal's age at the time of the offense. Among the mitigating evidence, the jury heard of the difficult conditions of Sophal's childhood in Cambodia and a Thai refugee camp. Also, they heard that he shot the victims only because he was acting under the duress of the belief that Outh Samanikone would kill him or his family if he did not. The jury heard witnesses describe Sophal as a follower, having a low

IQ, and enduring difficulties in adapting to life in the United States. Finally, the jury heard of the time Sophal saved the life of two girls only to later find that he missed the opportunity to save the life of his own brother. The jury may also have considered his guilty plea in deciding not to recommend a death sentence. With a plethora of mitigation evidence presented to the jury, it is impossible to determine that jury properly considered Sophal's youth or the factors discussed by this Court in *Roper*.

Additionally, it is certain that the jury was not permitted to consider constitutionally mandated mitigation evidence-that juvenile offenders under the age of eighteen at the time of the offense are categorically less culpable than adults. Without assurance that the jury properly consider Sophal youth, he is entitled to be resentenced.

D. The Kentucky Courts Violated the Principle of Equal Protection by Imposing a Harsher Sentence Upon Phon than Upon Other Juveniles who Received the Death Penalty Prior to *Roper*.

The Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *Vance v. Bradley*, 440 U.S. 93, 95 n. 1 (1979) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)). And equal protection "secure[s] every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by

express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co.*, 260 U.S. 441, 445 (1923) (*quoting Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 352 (1918)). Equal protection is violated even where a "class of one" is treated differently and there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

Here, the government has also arbitrarily treated Sophal Phon differently from other juvenile offenders who were resentenced following the *Roper* decision. Others resentenced due to the retroactive application of *Roper* received a sentence which was an available sentencing option at the time the death penalty was improperly applied. For Phon, the available sentences all included parole eligibility. Kentucky has refused to resentence Phon to one of these alternatives or grant him a new sentencing hearing. Instead, because the jury and judge refused to impose the death penalty against him he is left with a sentence that is much harsher than if the jury or judge had imposed death. No rational basis exists to justify this disparate treatment. Phon should not be treated more harshly than those juvenile offenders who were sentenced to death prior to *Roper*. Furthermore, the Kentucky Supreme Court recently held that under Kentucky's current sentencing scheme life without parole is not a permissible sentence for juveniles who were under the age of eighteen when they committed their crimes. *Shepherd, supra*, 251 S.W.3d 309. This assures Phon will be treated differently from all other offenders

under the age of eighteen. The equal protection clause of the Fourteenth Amendment forbids such arbitrary discrimination.

II. THE SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FOR JUVENILES UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.

Under the principles established in *Roper v. Simmons*, the categorically diminished culpability of juveniles and their additional propensity for rehabilitation, the sentence of life without parole for a youth under the age of eighteen is excessive and unwarranted and violates the Eighth and Fourteenth Amendments to the United States Constitution.

In *Roper*, this Court based its determination that juveniles are "categorically less culpable than the average criminal" on an analysis of the purposes of the death penalty. The Court recognized the case for retribution is not as strong with a minor as with an adult." *Roper*, at 572. Also, with juveniles there is an "absence of evidence of deterrent effect...[which]...is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* Like the death penalty, a sentence of life without the possibility of parole virtually eliminates the possibility of and incentive for rehabilitation for the juvenile offender. A prison sentence without the possibility of parole cuts off all hope of recognizing one's mistakes, transforming oneself, and reintegrating into society. While the

likelihood may be small that certain adults can rehabilitate themselves later in life, the same cannot be said of juveniles. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness may dominate in younger years can subside." *Id.* at 570.

A sentence of life without parole, like the death penalty, also fails to serve the purposes of retribution, deterrence or rehabilitation with offenders under the age of eighteen. A life sentence without parole would typically result in a much longer imprisonment for a juvenile than for an adult, which is inconsistent with the categorically lessened culpability of the juveniles. Nor are adolescent offenders any more likely to engage in the cost benefit analysis necessary to distinguish between a long prison sentence and a sentence without parole than they are to distinguish between the death penalty and a long prison sentence. Finally, a lack of parole eligibility seriously diminishes any expectation of rehabilitation for a juvenile offender.

The evolving standards of decency in this country and around the world, coupled with the evidence this court found in determine that offenders under the age of eighteen are categorically less culpable than the average criminal, indicate that life imprisonment without the possibility of parole violates the Cruel and Unusual Punishment prohibition contained in the Eighth Amendment.

Nine states and the District of Columbia forbid the sentence of life without parole for juveniles.

Alaska and New Mexico do not authorize life without parole as a punishment for any offender. Alaska Stat. § 12.55.125 (2005); N.M. Stat. Ann § 31-21-10 (2006). Kansas, New York, Texas and the District of Columbia do not allow life without parole for offenders under the age of eighteen. Kan. Stat. Ann. § 21-4622 (2005); N.Y. Penal Law § 125.27(1)(b) (2006); Tex. Fam. Code Ann. § 54.04(d)(3)(A) (2006); D.C. Code § 22-2104(a) (2006). Colorado's legislature also recently passed an act to this effect. 2006 Colo. Legis. Serv., Ch. 228 (H.B. 06-1315)(West). Indiana does not allow the sentence when the offender is less than sixteen at the time of the offense. Ind. Code § 35-50-2-3(b)(2) (2006). Most significantly here, Kentucky's Supreme Court recently held that the sentence of life without parole is not a sentencing option for juveniles in Kentucky. *Shepherd,* 251 S.W.3d at 310.

Other states provide for special consideration for juveniles to avoid imprisonment without release. In Montana, the statutory mandatory minimum does not apply if the offender was under the age of eighteen. Mont. Code Ann. § 46-18-222 (2005). Oregon also forbids mandatory minimums for juveniles waived from juvenile court. Or. Rev. Stat. § 161.520 (2005).

Kentucky long ago recognized that life without parole constitutes cruel and unusual punishment for juvenile offenders. In *Workman v. Commonwealth,* 429 S.W.2d 374 (Ky. Ct. App. 1968) two fourteen-year-old boys broke into the home of a 71-year-old lady, gagged her and raped her several times before

inserting the handle of a mop into her person. *Id.* at 375. Despite the facts of this crime, the court held:

> "[L]ife imprisonment without the benefit of parole for ...youths under all the circumstances shocks the general conscience of society today and is intolerable to fundamental fairness. The intent of the legislature in providing a penalty of life imprisonment without benefit of parole...undoubtedly was to death with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."

Id., 429 S.W.2d at 378.

Nevada has also recognized that life without parole is an excessive punishment for juvenile offenders. In *Naovarath v. State,* 779 P.2d 944 (Nev. 1989), Nevada's highest court held:

> "We do not question the right of society to some retribution against a child murderer, but given the undeniably lesser culpability of children for their bad actions, their capacity of growth and society's special obligation to children...the degree of retribution represented by the hopelessness of a life sentence without possibility of parole, even for the crime of murder...is

> excessive punishment for this thirteen-year-old boy. "

779 P.2d at 948.

While Sophal Phon was slightly older than the youths in the aforementioned cases, this court pointed out in *Roper* that for a variety of reasons the age of eighteen is the appropriate age for the criminal justice system to differentiate between youths and adults. *Roper,* 543 U.S. at 574. Furthermore, it cannot be ignored that these cases were decided years ago, and society has continued to develop and evolve its sense of decency toward treatment of juvenile offenders. In a society continually progressing toward more just and decent treatment of all criminal offenders, including juvenile offenders, a sentence of life imprisonment without possibility of parole may no longer be tolerated for youths under the age of eighteen when the offenses occurred.

Overwhelming international opinion also exists against sentencing juveniles to life without parole. The United Nations Convention on the Rights of the Child prohibits life without parole sentences for offenders under the age of eighteen.[2] This convention has been ratified by 191 of 193 nations in the world, and the two that have not ratified it, the United States and Somalia, have signed it indicating they

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[2]"No Child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age." Art. 37(a) United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-70 (entered into force Sept. 2, 1990).

intend to ratify it in the future. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty also forbids the punishment.[3] The European Court of Human Rights has concluded that life without parole for an offender under eighteen violates Article 3 of the European Convention, which prohibits "inhuman or degrading treatment or punishment." When the British Parliament abolished the juvenile death penalty, they also forbade life sentences without the possibility of release.[4]

The rationale behind *Roper* and the evolving standards of decency in this country and worldwide indicate that a sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment when applied to offenders who

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[3] "Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by judicial authority, without precluding the possibility of his or her release." United Nations Rules for the Protection of Juveniles Deprived of Their Liberty. G A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

[4] Section 53(1) of the Children and Young Persons Act of 1933 provides:

A person convicted of an offence who appears to the court to have been under the age of 18 years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life, nor shall sentence of death be pronounced on or recorded against any such person; but in lieu thereof the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Secretary of State may direct.

were under the age of eighteen at the time of their offense.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court will grant this Petition for a writ of certiorari.

Respectfully submitted,

MICHAEL L. GOODWIN
Counsel for Sophal Phon

No. _____

In The

Supreme Court Of The United States

SOPHAL PHON,
Petitioner

v.

COMMONWEALTH OF KENTUCKY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

APPENDIX

APPENDIX

Order, *Phon v. Commonwealth,* Kentucky Supreme Court Action No. 2008-SC-00599, denying discretionary review, entered December 15, 2008.....A1

Opinion on Appeal, *Phon v. Commonwealth,* 2008 WL 612283, Kentucky Court of Appeals, Action No. 2006-CA-002456, entered March 7, 2008,.....A2

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Motion to Grant New Sentencing Hearing Pursuant to CR 60.02(e) & (f) & RCr 11.42, Warrant Circuit Court, Action No. 96-CR-00599-005, filed February 17, 2006.....A20

Supreme Court of Kentucky

2008-SC-000250-D

SOPHAL PHON MOVANT

WARREN CIRCUIT COURT
V. 96-CR-00599

COMMONWEALTH OF KENTUCKY
RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Minton, C.J., not sitting.

ENTERED: December 10, 2008.

s/ Will T. Scott
DEPUTY CHIEF JUSTICE

Court of Appeals of Kentucky

SOPHAL PHON, Appellant

v.

COMMONWEALTH OF KENTUCKY, Appellee.

No. 2006-CA-002456-MR.

2008 WL 612283

March 7, 2008.

Discretionary Review Denied by

Supreme Court Dec. 10, 2008.

Appeal from Warren Circuit Court, Action No. 96-CR-00599-005; John R. Grise, Judge.

Rebecca Hobbs, Assistant Public Advocate, Frankfort, KY, for appellant.

Gregory D. Stumbo, Attorney General, Matthew R. Krygiel, Assistant Attorney General, Frankfort, KY, for appellee.

Before ACREE, KELLER, and MOORE, Judges.

OPINION

KELLER, Judge.

Sophal Phon (Phon) was less than 18 years of age when the Warren Circuit Court sentenced him to life in prison without the possibility of parole. Because he had been charged with a capital offense and the jury considered the death penalty among other

possible sentences, Phon filed a motion for a new sentencing hearing based on *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The circuit court denied Phon's motion and it is from that order of denial that Phon appeals. For the following reasons, we affirm.

FACTS

Two appeals have been prosecuted as a result of Phon's conviction. In *Commonwealth v. Phon*, 17 S.W.3d 106 (Ky. 2000), the Commonwealth unsuccessfully challenged the inclusion of life without the possibility of parole in the jury instructions. In *Phon v. Commonwealth*, 51 S.W.3d 456 (Ky. App. 2001), Phon unsuccessfully sought post-conviction relief based on a claim of ineffective assistance of counsel.

As set forth in *Commonwealth v. Phon*, 17 S.W.3d at 107,

> Sophal Phon and his co-defendants ... were jointly indicted for the 1996 burglary, robbery, and execution-style murder of a Warren County couple. The Commonwealth filed notice of its intent to seek the death penalty against four of the five defendants, including Phon, then a seventeen year old juvenile.

Before Phon's trial, two significant procedural events occurred. First, the trial court refused to sever Phon's trial from that of one of his co-defendants, Outh Sananikone (Sananikone). According to Phon, Sananikone had ordered the shootings and Phon complied with Sananikone's order out of fear for his

life and the lives of his relatives. Phon's attorney feared that a jury would want to impose the death penalty on Sananikone and, having done so, would feel compelled to sentence Phon to death as well.

The second procedural event was the passage of HB 455 by the legislature. HB 455 provided for a sentence of life without parole in capital cases. Although passed by the legislature during the 1998 legislative session, the Act was not scheduled to take effect until after Phon's trial. In a pre-trial motion, the Commonwealth moved to exclude that sentence from the jury instructions. The trial court found that, although the legislation would not be effective until after the trial, Phon could opt to include the sentence of life without the possibility of parole in the jury instructions.

Faced with the possibility, if not probability, of a death sentence, "the day before his trial was scheduled to begin, Phon pled guilty ... to two counts of murder, first degree assault, first degree robbery, and first degree burglary." *Commonwealth v. Phon*, 17 S.W.3d at 107. Phon also opted to include the sentence of life without parole in the jury instructions. We note that Phon was not motivated to enter into this plea by any offers or promises by the Commonwealth. The primary factor motivating Phon was avoidance of the death penalty, which his attorney believed could best be accomplished by a guilty plea and reliance on the mercy of a jury. After a jury trial on the sole issue of what sentence to impose, the jury recommended a sentence of life without the possibility of parole, which the circuit court imposed.

In 2005, approximately seven years after Phon's trial, the United States Supreme Court held that a death sentence for a defendant under the age of 18 was constitutionally prohibited. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Phon filed his motion for a new sentencing hearing following the Roper decision arguing that, because he had been subject to the death penalty when he pled guilty, he should be entitled to a new sentencing hearing. The circuit court disagreed and, for the reasons set forth below, we affirm.

STANDARD OF REVIEW

CR 60.02 provides that a court may "relieve a party or his legal representative from its final judgment, order, or proceeding[.]" Because the granting of relief is at the discretion of the trial court, we review the trial court's decision for abuse of that discretion. See *White v. Commonwealth*, 32 S.W.3d 83 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

ANALYSIS

As noted by the Commonwealth in its brief, this Court had rendered a number of unpublished opinions arising from the Roper decision. By previous order, the Commonwealth's citations to those unpublished opinions have been stricken from the record. However, one of those opinions, *Sims v. Commonwealth*, 233 S.W.3d 731 (Ky. App. 2007), has now been published. In *Sims*, the defendant was

subject to the death penalty and pled guilty in exchange for a recommendation from the Commonwealth of a sentence of life in prison without the possibility of parole for 25 years. This Court held that

> the constitutional right established in Roper was that someone who was under 18 when he committed murder cannot be sentenced to death, not that he might escape a life sentence. Indeed, the Roper opinion contains an obiter dictum to the effect that life imprisonment without the possibility of parole remains a permissible sentence....

Id. at 733.

This case differs from *Sims* because Phon received no consideration from the Commonwealth in exchange for his guilty plea. However, it is similar to *Sims* because both Sims and Phon entered into guilty pleas in an attempt to avoid the death penalty. During testimony at the hearing regarding Phon's ineffective assistance of counsel claim, Phon's trial counsel testified that he did not believe that Phon could win an acquittal and that a guilty plea leaving sentencing to the mercy of a jury was the only viable way for Phon to avoid the death penalty. Furthermore, as noted above, Phon's counsel believed it was of paramount importance to sever Phon's trial from Sananikone's and a guilty plea accomplished that goal. Based on the preceding considerations, Phon agreed to plead guilty and consented to including life without the possibility of parole in the jury instruction in the hope of avoiding

a death sentence. *Phon v. Commonwealth*, 51 S.W.3d 456, 460 (Ky. App. 2001).

Phon's primary argument is that, if the death penalty had not been a possibility, he never would have opted to include the sentence of life without the possibility of parole in the jury instructions. Furthermore, Phon argues that inclusion of the now unconstitutional sentence of death in the jury instructions invalidated the jury's sentence. In support of that position, Phon cites to *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). However, that case can be easily distinguished. The *Leary* case involved convictions for possession of marijuana. Under the statutory provisions then in place, the government was required to establish a number of elements of the crime in order to obtain a conviction. The statute provided that mere possession of marijuana resulted in the presumption of certain elements of the crime, thus relieving the government of the burden of proving those elements. The Supreme Court held that the presumption was unconstitutional and therefore overturned the possession convictions. In doing so, the Supreme Court stated that "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Id.* at 31-32. *Leary* addresses a faulty jury instruction involving alternative theories of conviction, not alternative theories of sentencing. Therefore, we hold that *Leary* has no application to the case herein.

We find *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), to be more persuasive. As the Supreme Court noted in Brady

> [o]ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, cf. Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A

> plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then-existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.
>
> We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Brady, 397 U.S. at 756-57.

Although *Brady* deals specifically with the voluntariness of a guilty plea in light of changing penalties, the Supreme Court's logic applies to Phon's case. Phon was advised by counsel of the then existing possible penalties. Phon was advised by counsel that he likely would be found guilty. Phon entered his plea of guilty in the hope of receiving a lighter sentence and Phon entered his plea in order to sever his case from his co-defendants. Just as Phon cannot now change his guilty plea because the

maximum penalty would no longer apply, he cannot now obtain a new sentencing hearing simply because the maximum penalty would no longer apply.

Finally, we note that Phon has cited extensively to *Roper*. As noted above, this Court previously determined, albeit with somewhat different facts, that *Roper* only applies retroactively to "those cases in which a sentence of death was imposed upon a defendant who was under the age of 18 at the time he committed the crime." *Sims v. Commonwealth*, 233 S.W.3d 731, 733 (Ky. App. 2007). We find no reason to alter that earlier determination and hold that, because the death penalty was not imposed on Phon, *Roper* has no application to this appeal.

CONCLUSION

For the reasons set forth above, we hold that *Roper* has no application to Phon's case and that the circuit court did not abuse its discretion when it denied Phon's motion for a new sentencing hearing. Therefore, we affirm the circuit court.

ALL CONCUR.

COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT, DIVISION 2
INDICTMENT NO. 96-CR-00599-005

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V. **ORDER DENYING DEFENDANT'S MOTION FOR A NEW SENTENCING HEARING**

SOPHAL PHON DEFENDANT

This matter is before the Court on the motion of Sophal Phon for a new sentencing hearing pursuant to CR 60.02(e) and (f) and RCr 11.42. After reviewing counsel's briefs and the law cited therein, and after holding an evidentiary hearing on June 26, 2006, and being otherwise sufficiently advised;

THE COURT DENIES Phon's motion.

FACTS

On August 17, 1996, members of the Asian Boyz Gang burglarized the home of Khamphao Phromratsamy and Manyvanh Boonprasert. They robbed the family, which included three children, and then took the parents and their twelve-year-old daughter, Judy, into the bathroom and shot each one of them in the head, execution style. Judy survived

the shooting after lying in the bathroom with her murdered parents for hours before being discovered barely alive.

In November of 1996, the Warren County Grand Jury indicted Sophal Phon on charges of two counts of Murder, Assault First Degree, Robbery First Degree, and Burglary First Degree. Before trial, the Kentucky General Assembly amended the possible penalties under KRS 532.030(1) by adding the penalty of life without the possibility of probation or parole (LWOP) in death penalty cases, with the amendment to take effect July 15, 1998. The Commonwealth moved the court to prohibit the application of the new penalty to the pending indictment, but, on July 2, 1998, the trial court denied the Commonwealth's motion, a decision affirmed by the Kentucky Supreme Court on April 13, 2002, in Commonwealth v. Phon, Ky., 17 S.W.3d 106 (2000), which came after the Attorney General's certification action on that issue. The court held that the new penalty of LWOP could be imposed in cases involving the commission of capital crimes occurring prior to July 15, 1998, with a defendant's consent to the imposition of the new penalty.

Phon, in fact, had done just that when he entered a guilty plea on July 5, 1998. His plea was "open," meaning it was entered without the promise from the Commonwealth for any sentencing recommendation. Therefore, a sentencing hearing commenced on July 28, 1998, and concluded on August 7, 1998, before a jury that ultimately recommended life without the possibility of parole.

On March 1, 2005, the United States Supreme Court decided Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In Roper, the defendant committed capital murder when he was 17 years old and, after turning 18, was sentenced to death. The Roper court upheld a decision of the Missouri Supreme Court finding it unconstitutional to impose a sentence of death for individuals who commit capital crimes while under the age of 18.

Phon now urges this Court to extend the prohibition for the death penalty found in Roper to life without parole. For the reasons stated below, THIS COURT DENIES the requested relief.

TIHIS COURT FINDS that it has jurisdiction to consider this issue under CR 60.02(e) and (f), for if it were true that the reasoning of Roper must extend to the serious penalty of life without the possibility of parole, then it is certainly no longer equitable that the judgment against Phon should have prospective application, and such a conclusion, if inevitable, would present a reason of an extraordinary nature justifying relief from permanent imprisonment.

However, THIS COURT FINDS nothing inevitable about the logical extension of Roper to this case or the relief sought by Phon. Movant argues that this Court (as well as presumably other courts and legislatures), in sentencing Phon, was "unaware of the full effect of adolescent brain development as it relates to culpability and thus, unable to give full and sufficient consideration to the constitutional import of adolescent brain development as a mitigator." (Movant's Brief, p. 4.) These concepts, the movant argues, were unknown until Roper v.

Simmons. There was nothing new, however, at the time Roper was decided about the science referenced therein regarding adolescent brain development as it relates to culpability: many states had already acted on this scientific data and research confirming what most parents, teachers, and prosecutors have known for years. Such information could have been presented, if desired, during any sentencing trial, though it would not necessarily be required because jurors intuitively probably know and assume it. It was not even a new concept at the time of Roper that courts should not impose death on juveniles: 18 states already forbid it. What was new at the time of Roper was that the imposition of the death penalty on persons under 18 years of age violated the 8th and 14th Amendments and that, therefore, state legislatures and Congress could not weigh and decide this issue themselves.

More pertinent to this trial court's decision, however, is the fact that the Roper court approved the very same sentence received by Phon following his 1998, sentencing trial, confirming that life without the possibility of parole is an appropriate sentence. Moreover, the Kentucky Supreme Court has already once determined that life without the possibility of parole could be imposed in this case. Commonwealth v. Phon, supra.

Perhaps most pertinent of all reasons to deny this motion is the fact that the Roper case prohibited the imposition of the death penalty, not life without the possibility of parole. The jury in the sentencing court, perhaps mindful of the "lack of maturity and an undeveloped sense of responsibility . . . found in

youth . . ." resulting in "impetuous and ill-considered actions and decisions," rejected the death penalty and imposed the sentence approved by Roper – life without parole. KRS 532.025(2)(b)(8) explicitly allows a consideration of the youth of the defendant as a mitigating factor in the decision of whether to impose the death penalty. The jury, and the court sentencing Phon, apparently did so and were in total agreement with the Roper majority.

The movant also claims that he was prejudiced by the fact that he faced a jury who believed that the death penalty was an appropriate option, arguing that "had death not been an option and had the jury been instructed on the newly-defined appropriate sentencing range, a term of imprisonment for 20-50 years, life, or life without parole for 25 years, the jury may have reached a different sentencing decision. A reasonable probability exists that at least one juror would have viewed the mitigating evidence presented at trial as more mitigating if he or she knew that Movant could not be executed because of his mental immaturity." This Court will not take the huge, unsupported leap in logic necessary to adopt movant's position. This Court can only reasonably conclude that the jurors deciding Phon's fate unanimously chose life without the possibility of parole because it was a sentence that fit the crime and the defendant.

Movant also argues that he was prejudiced by the fact that he was sentenced by a death-qualified jury that "are more conviction prone than non death-qualified juries," citing Lockhart v. McCree, 476 U.S. 162 (1986). Conviction, however, was not an issue

here because the defendant had already pled guilty to Murder, Robbery First Degree, Assault First Degree, and Burglary First Degree. All of the jurors in this case, apparently, affirmed they could consider the full range of penalties and, obviously, they did, rejecting the death penalty and picking the one that fit the crime and the defendant. The jurors, in fact, were actually *opposed* to the death penalty in this case, as evidenced by their decision not to impose it.

Speculation about what a jury would have done if a range of penalties excluding the death penalty was presented is not an appropriate guessing game for this Court. As stated by Justice Cooper in his concurring opinion in Commonwealth v. Phon:

> [w]e should not presume to hold that the verdict was wrong and that death was a more appropriate penalty in this case. Nor should we presume that absent the option of life without parole the jury would have imposed the death penalty rather than a sentence of life without parole for twenty-five years, or vise-versa.

Id., at 109. If the Kentucky Supreme Court will not engage in the type of raw speculation urged by the movant, a circuit court judge should not either.

The movant also claims that he would not have subjected himself to life without the possibility of parole if the death penalty were "off the table." THIS COURT, HOWEVER, FINDS his claim not credible and unsupported by any logic or proof other than his assertion of it. It is more reasonable to believe that the defendant pled guilty because the case against

him was compelling, his crime horrific, and throwing himself at the mercy of the Court was a reasonable, tactical move. Furthermore, this Court has no reason to believe that the outcome of a guilt phase would have been any different and, once convicted, that a jury would have picked a sentence other than life without the possibility of parole.

Movant also argues that upholding the sentence of LWOP without reconsidering it "in light of the newly established evidence in Simmons of the impact of adolescent brain development on the culpability of juveniles, in light of the fact that juveniles have a higher likelihood of rehabilitation than adult offenders, and in light of the fact that a sentence of LWOP is an unconstitutional sentence for juvenile offenders would violate Movant's constitutional rights." (Movant's Brief, p. 11.) Again, Roper did not hold that LWOP was unconstitutional. The Kentucky Legislature can better reflect this state's "evolving standards of decency" than can this Court when determining the range of possible criminal penalties. Moreover, it appears the jury in this case, in fact, considered "the newly established evidence" of adolescent brain development seven years before the U. S. Supreme Court discovered it in Roper. Furthermore, nothing hindered the Court or any of the parties from arguing, considering, and giving full weight to the "importance of adolescence as a mitigator with respect to the specific level of brain development of juveniles in general and with respect to Movant specifically." (Movant's Brief, p. 10.) Finally, the movant argues that LWOP is cruel and unusual punishment for juveniles because it "no more allows for rehabilitation than does the death

penalty." (Movant's Brief, p. 13.) Such argument is patently erroneous - LWOP does allow for rehabilitation to the extent rehabilitation is available in prison. Death does not allow for rehabilitation. Again, such considerations are better left to the legislative process in light of the fact that the U. S. Supreme Court in Roper has preserved the constitutional validity of life without the possibility of parole for murderers under 18 years of age.

Lastly, the movant argues that LWOP is statutorily prohibited in cases involving juvenile offenders by KRS 640.040(1) that provides that "a Youthful Offender convicted of a capital offense regardless of age *may* be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years." Movant argues that KRS 532.060(2)(a) authorizes a maximum term of imprisonment for Class A felonies as not less than 20 years, nor more than 50 years, or life imprisonment. Therefore, movant concludes, neither statute mentions LWOP as an option for juvenile offenders and, therefore, it cannot be imposed. However, movant ignores KRS 532.030(1) that specifically authorizes the imposition of LWOP in capital offenses, and further ignores the fact that no mandatory language requires the imposition of the sentences set forth in KRS 532.060(2)(a). The language of KRS 640.040(1) is permissive, not mandatory. KRS 532.030 authorizes LWOP as a sentencing option for capital crimes. Furthermore, the movant agreed to LWOP as being an appropriate

sentence in the case at bar at his sentencing trial and, therefore, long ago waived any such claim.

WHEREFORE, for the reasons stated above, the movant's motion for a new sentencing hearing is DENIED.

This is a final and appealable order, and there is no just cause for delay.

This 15 day of November, 2006.

s/John R. Grise
JOHN R. GRISE, JUDGE
WARREN CIRCUIT COURT, DIVISION 2

Entered 11-16-06

Clerk, send copies to:

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COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
DIVISION NO. 2
INDICTMENT NO. 96-CR-00599-005

SOPHAL PHON MOVANT

VS. MOTION TO GRANT NEW SENTENCING HEARING PURSUANT TO CR 60.02(e)&(f) & RCr 11.42

COMMONWEALTH OF KENTUCKY
RESPONDENT

* * * * * * * *

Comes now the Movant, Sophal Phon, by and through counsel, and respectfully moves this Court to grant a new sentencing hearing in the above-cited case, pursuant to CR 60.02(e)&(f) and RCr 11.42.

PROCEDURAL HISTORY

In November of 1996, the Warren County Grand Jury indicted Sophal Phon on charges of Murder, 2 counts, Assault, 1st degree, Robbery, 1st degree, and Burglary, 1st degree. During the pendency of the trial date, and before Phon subsequently decided to plead guilty, the Kentucky General Assembly enacted and the Governor signed HB 455, which became effective July 15, 1998. This house bill amended KRS 532.030 by adding the penalty of life without the possibility of probation or parole in death penalty cases. Phon

chose to be tried under the amended KRS 532.030 and on July 7, 1998 Phon decided to not go to trial and instead pled guilty to the above stated charges. Phon did opt for a sentencing hearing. At the conclusion of the sentencing hearing, the jury recommended the sentence of life without the possibility of parole. The Warren Circuit Court followed the jury's recommendation and sentenced Phon to life without the possibility of parole on September 4, 1998. In light of Roper v. Simmons, *infra*, the Movant, Sophal Phon, now respectfully requests this Court to grant a new sentencing hearing in the case. The grounds for this motion are delineated below.

ROPER V. SIMMONS

On March 1, 2005, the United States Supreme Court drastically changed the state of the law as it applies to juvenile offenders. In Roper v. Simmons, 125 S.Ct. 1183 (2005), the Court ruled that the execution of offenders under the age of 18 is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. Id. Acknowledging the evidence of a national consensus against the death penalty for juveniles, including the fact that a majority of States had already "rejected the imposition of the death penalty on juvenile offenders under 18," and the evolving standards of decency, the Court explicitly noted that adolescents are different than adults – both physiologically and emotionally. Id. at 1194. The Court specifically identified three significant differences between youth and adults that impact juveniles' culpability and which "demonstrate that juvenile offenders cannot

with reliability be classified among the worst offenders." Id. at 1195.

First, "as any parent knows and as the scientific and sociological studies...tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" Simmons at 1195, *quoting* Johnson v. Texas, 509 U.S. 350, 357 (1993).

Second, the Court noted that juveniles are more susceptible to outside influences and peer pressure than adults.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment...[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.

Simmons at 1195. (internal citations, quotation marks and parens omitted).

Third, the character of juveniles is not well formed and thus, juvenile personality traits are more transitory and less fixed than those of adults. Id.

Relying upon these differences and the unique emotional and physical susceptibility of juveniles to

harmful influences as a result of emotional and legal constraints, the Court explained the reasons for the lesser culpability of youth: the susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult; juveniles' vulnerability and comparative lack of control over their immediate surroundings mean they have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment; the reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character; and from a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Simmons at 1195-1196.

In reaching its decision that the death penalty is unconstitutional for those under age 18, the Court further noted how a juvenile's immaturity, irresponsibility, and susceptibility to negative influences prevent the "two distinct social purposes served by the death penalty" - retribution and deterrence of prospective offenders – from being satisfied. Id. "Once the diminished culpability of juveniles is recognized, it is evidence that the penological justification for the death penalty apply to them with lesser force than to adults." Id. at 1196.

Based upon the fact that juveniles have a lesser culpability due to their adolescent brain development, the evolving standards of decency, and

the fact that the goals of the death penalty are not met by executing those with a lesser culpability, Simmons held that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Id. at 1200.

Because Simmons had not yet been decided at the time this Court sentenced Movant, the Court was unaware of the full effect of adolescent brain development as it relates to culpability and was thus, unable to give full and sufficient consideration to the constitutional import of adolescent brain development as a mitigator. Further, the appropriate sentencing range for juveniles, as defined in Simmons, had not been properly established when the Court originally sentenced Movant. Id. Therefore, Movant is entitled to a new sentencing hearing in which the Court may give sufficient weight to the new scientific evidence of adolescent brain development and its impact on culpability and in which the Court makes its sentencing decision within the appropriate sentencing range for juvenile offenders.

THE COURT'S JURISDICTION TO GRANT RELIEF

A. Civil Rule 60.02(e) & (f)

Sophal Phon now seeks to modify or correct his sentence under CR 60.02 (e) and (f), which provides, in pertinent part, the following:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment,

> order, or proceeding upon the following grounds: (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application*; or (f) *any other reason of an extraordinary nature justifying relief.* (Emphasis added).

CR 60.02 applies to criminal proceedings by virtue of RCr 13.04.

It is clear from a reading of CR 60.02 that the Court has jurisdiction to modify or reduce the sentence in the instant case. As noted in the annotation to the rule, CR 60.02 is the correct vehicle in which to bring motions for circumstances arising subsequent to judgment that affect the judgment's validity. *See* Fryrear v. Parker, 920 S.W.2d 519 (Ky. 1996); National Electric Service Corporation v. District, 279 S.W.2d 808 (Ky. 1955).

Further, it is well established that the courts in this jurisdiction, when interpreting statutory language, are to give words their plain and ordinary meaning. Lynch v. Commonwealth, Ky., 902 S.W.2d 813 (1995). Therefore, the Court must assume that the drafters of CR 60.02(f) deliberately chose to use the word "any" to describe the realm of reasons extraordinary in nature that could justify relief under this rule. This language specifically gives the Court broad discretion as to factors it can consider in making a 60.02(f) decision. Likewise, the drafters of CR 60.02 purposefully chose the word "extraordinary" when describing the types of reasons

that would justify relief. The word "extraordinary" is defined by "[b]eyond what is ordinary and usual." American Heritage Dictionary of the English Language 649 (Rev. 3rd Ed. 1992).

In the instant case, it is no longer equitable that Movant's sentence be upheld without the Court first considering the new understanding of adolescent brain development and its effect on a juvenile's culpability, within the newly-defined appropriate sentencing range, as illustrated in Simmons, *supra*. Further, the effect of the Court's holding on the treatment of juveniles in Simmons regarding adolescent brain development and diminished culpability is an extraordinary reason justifying relief in the case at hand.

B. Rule of Criminal Procedure 11.42

Movant also seeks to correct his sentence under RCr 11.42, which provides that "[a] prisoner in custody under sentence...who claims...that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it." RCr 11.42(1). Because Simmons had not yet been decided when the Court sentenced Movant, the Court did not have the information necessary to make a fully-informed decision regarding the appropriate weight to give to the impact of adolescent brain development on culpability. 125 S.Ct. 1183. Further, the Court was forced to make its sentencing decision in Movant's case outside the appropriate sentencing range as later defined in Simmons. Id. RCr 11.42 provides the Court with the vehicle in which it may correct Movant's sentence by

giving full effect to the mitigating value of adolescent brain development within the appropriate sentencing range per Simmons. Id.

Because most motions filed "under this rule shall be filed within three years after the judgment becomes final," it is important to note that this motion is, in fact, timely filed. RCr 11.42(10). Subsection 10(b) of the rule states that if the "fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively" the three-year time limit is waived. Because the Supreme Court decided Roper v. Simmons in March of 2005, the constitutional right asserted in Simmons and at issue here was just established. Further,

> [t]he rule announced in Roper – that a person cannot be sentenced to death for a crime committed before the age of eighteen- is clearly a substantive, rather than procedural, rule. It alters the class of persons eligible for the death penalty. Accordingly, Roper applies retroactively to all cases involving offenders under the age of eighteen at the time of the offense, including those cases on collateral review. Baez Arroyo v. Dretke, 362 F.Supp.2d 859 (W.D. Texas, 2005).

See also State v. Chapman, 611 S.E.2d 794 (N.C. 2005).

ARGUMENT

UPHOLDING MOVANT'S SENTENCE WITHOUT CONSIDERING THE FULL

EFFECT OF ADOLESCENT BRAIN DEVELOPMENT AS IT RELATES TO CULPABILITY IN LIGHT OF ROPER V. SIMMONS DEPRIVES MOVANT OF THE DUE PROCESS OF LAW AS GUARANTEED UNDER §§ 2 AND 11 OF THE KENTUCKY CONSTITUTION AND THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF § 17 OF THE KENTUCKY CONSTITUTION AND THE 8TH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Roper v. Simmons Furthered The Understanding And Importance Of Adolescent Brain Development As A Mitigating Factor

As stated above, Roper v. Simmons, *passim*, dramatically changed the state of the law for juvenile offenders and drastically furthered the understanding and importance of adolescent brain development on the level of culpability of juveniles. In declaring that the execution of juveniles under the age of 18 constituted cruel and unusual punishment, the Supreme Court noted three distinct differences between juveniles and adults that render suspect any conclusion that a juvenile falls among the "worst offenders." Id. at 1195. The Court cited scientific studies confirming that youth under 18 show #1) immaturity, resulting in impetuous behavior and

poor decision making; #2) susceptibility to negative influences; and #3) personality traits that are not as formed as those in adults. Id.

Due to the effect these physiological and emotional differences have on youth, and the strong possibility that juveniles can be rehabilitated, the Court declared that juveniles should not be held to the same level of culpability or punishment as their adult counterparts. The Court noted,

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and sufferings of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issues a far graver condemnation... Simmons at 1197. (citations omitted).

Much of the Court's reasoning in Simmons and its principles concerning the appropriate weight to give

to the impact of adolescent brain development on culpability, was based upon its 2002 ruling in Atkins v. Virgina, 536 U.S. 304 (2002), where the court declared the execution of the mentally retarded as unconstitutional. In Atkins, the Court noted that the impairments suffered by mentally retarded people as a whole diminish their culpability to the point where neither of the two recognized purposes for the death penalty - retribution and deterrence of prospective offenders - would be served by permitting their execution. Id. at 318-320. Further, the mental impairments that diminish the culpability of the mentally retarded increase the risk that death will be imposed despite factors that call for a lesser sentence. Id. Specifically, mentally retarded defendants: #1) are more likely to give false confessions; #2) are less likely to give meaningful assistance to their counsel; #3) are typically poor witnesses; and, #4) have a demeanor that can create the false impression of a lack of remorse. Id. at 320-321.

Aware of the fact that juvenile offenders possess many of the same characteristics of those of the mentally retarded, due to their diminished level of mental functioning, the Simmons Court realized the unconstitutional risk that the death penalty would be imposed on juveniles in spite of factors that called for a lesser sentence.

> An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth, as a matter of course, even where the juvenile

> offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less than death. In some cases, a defendant's youth may even be counted against him. Simmons at 1197.

The Court felt as if the risk of decision makers failing to take into account a juvenile's diminished culpability is so great in fact that it held the Eight Amendment prohibits the execution of juvenile offenders. Simmons, 125 S.Ct. 1183.

B. The Understanding of Adolescent Brain Development and Its Full Impact on a Juvenile's Level of Culpability Was Not Yet Recognized When The Court Made Its Sentencing Decision In the Instant Case

The Roper v. Simmons, *passim*, decision, and the scientific studies upon which the decision was based, clearly establishes the fact that juveniles have a lesser degree of culpability due to their adolescent brain development than adults. The Court mandated the full weight decision makers must give to adolescence as a mitigating factor when sentencing juvenile offenders.

When this Court originally sentenced Movant in the case at hand, the extent that adolescent brain development has on a juvenile's degree of culpability had not yet been fully recognized. A juvenile's lack of full brain development is an even greater mitigating factor now than anyone understood at the time of Movant's plea and sentencing. Therefore, when the

Court made its sentencing decision, it was unable to give full and sufficient consideration to the constitutional importance of adolescence as a mitigator with respect to the specific level of brain development of juveniles in general and with respect to Movant specifically.

C. Movant Was Prejudiced By The Belief of The Jury At Time of Trial That The Death Penalty Was An Appropriate Sentencing Option

The appropriate range for sentencing juvenile offenders was not established until the Simmons decision. When the Movant originally went to trial and the jury considered its sentencing penalty in this case, the jury believed that the death penalty was an appropriate sentencing option. Had death not been an option and had the jury been instructed on the newly-defined appropriate sentencing range, a term of imprisonment for 20-50 years, life, or life without parole for 25 years, the jury may have reached a different sentencing decision. A reasonable probability exists that at least one juror would have viewed the mitigating evidence presented at trial as more mitigating if he or she knew that Movant could not be executed because of his mental immaturity. It is also paramount for this Court to take note of the fact that Movant would not have been in a position to subject himself to a harsher punishment, life without the possibility of parole, than the statute dictated at the time of his plea if death had not been an option. Therefore, Movant would be serving an entirely different sentence than the one he is currently serving.

Further, Movant was prejudiced by the fact that he was sentenced by a death-qualified jury. It has been clearly established in social science studies that death-qualified juries are more conviction prone than non-death-qualified juries. *See* Lockhart v. McCree, 476 U.S. 162, 173 (1986); United States v. Young, 424 F.3d 499, 508 (6th Cir. 2005). Additionally, the death qualification of the jury denied Movant his right to have a fair and impartial jury, representative of the cross-section of the community, determine his sentence, since those jurors who were opposed to the death penalty were arbitrarily and unnecessarily excluded. *Cf.* Peters v. Kiff, 407 U.S. 493 (1972).

D. Upholding the Sentence of Life Without Parole Without First Considering the Holding in Simmons and the Evolving Standards of Decency Would Violate Movant's Constitutional Rights

The jury recommended, and the judge imposed, Movant's sentence of life without the possibility of parole (hereinafter "LWOP"). Failing to reconsider this sentence in light of the newly-established evidence in Simmons of the impact of adolescent brain development on the culpability of juveniles, in light of the fact that juveniles have a higher likelihood of rehabilitation than adult offenders, and in light of the fact that a sentence of LWOP is an unconstitutional sentence for juvenile offenders would violate Movant's constitutional rights. Id.

As illustrated above, the full impact of brain development on a youth's level of culpability has not been established when the jury made their

sentencing recommendation, of which the Judge adopted. Therefore, those parties were unable to make a fully informed and intelligent decision regarding what penalty they should impose when sentencing Movant. Neither party was armed with the knowledge that Simmons has since provided that the possibility of death was never an appropriate sentencing option for Movant in the first place. Simmons illustrates a societal change in the evolving standards of decency which allow one to revisit the issue of punishment in this case.

Applying the principles established in Roper v. Simmons, 125 S.Ct. 1183, it is apparent that the substantive reason why the 8th and 14th Amendments bar juveniles from being subjected to the ultimate punishment of death also bars the imposition of a sentence of life without parole. First, juveniles are less culpable than adults, and thus are not deserving of the harshest punishments reserved for adult offenders. Given the immaturity and weak sense of responsibility that occurs in conjunction with being a child, a sentence of LWOP for a youthful offender is excessive and unwarranted. *See* Solem v. Helm, 463 U.S. 277 (1983); Harmelin v. Michigan, 501 U.S. 957 (1991).

In fact, the belief that a sentence of LWOP constitutes cruel and unusual punishment for youthful offenders is one that has long been recognized in the Commonwealth of Kentucky. In Workman v. Commonwealth, 429 S.W.2d 374 (Ky.Ct.App. 1968), the Court stated the first approach in determining whether a punishment constitutes cruel and unusual punishment in

violation of the 8th Amendment is "to determine whether in view of all the circumstances the punishment in question is of such character as to shock the general conscience and to violate the principles of fundamental fairness. This approach should always be made in light of developing concepts of elemental decency." Id. at 378. Workman is a case in which two fourteen-year-old boys broke into the home of a 71-year-old lady, gagged her and raped her several times before inserting the handle of a mop into her person. Id. at 375. Despite these horrible circumstances, the Court held that:

> [L]ife imprisonment without the benefit of parole for...youths under all the circumstances shocks the general conscience of society today and is intolerable to fundamental fairness. The intent of the legislature in providing a penalty of life imprisonment without benefit of parole...undoubtedly was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life. Id. at 378.

See also Naovarath v. State, 779 P.2d 944, 948 (Nev. 1989), in which the Court held a sentence of LWOP as excessive for juvenile offenders:

> We do not question the right of society to some retribution against a child murderer,

> but given the undeniably lesser culpability of children for their bad actions, their capacity for growth and society's special obligation to children...the degree of retribution represented by the hopelessness of a life sentence without possibility of parole, even for the crime of murder...is excessive punishment for this thirteen-year-old boy.

In determining that LWOP is a cruel and unusual punishment for juveniles, it is also important to note that life without the possibility of parole no more allows for rehabilitation than does the death penalty. Rather, a LWOP sentence for a young offender cuts off all hope, all opportunity to learn from mistakes and transform oneself, and to contribute to and reintegrate into society. A LWOP sentence, like that a death sentence, also fails to serve the purposes of the retribution and deterrence. As with the death penalty, it is incredulous to think that adolescent offenders make the kind of cost-benefit analysis necessary to distinguish between a long term of imprisonment and a sentence without the possibility of parole.

The evolving standards of decency and the principles established in Simmons regarding adolescent brain development forbid juvenile LWOP sentences just like it forbids the death penalty for juveniles.

E. A Sentence of Life Without the Possibility of Parole For a Youthful Offender Is Not Permitted By Statute in Kentucky

Additionally, Kentucky's current statutes do not allow for a sentence of LWOP to be imposed upon juveniles. KRS 640.040(1) states, in pertinent part, that "a Youthful Offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years." Additionally, KRS 532.060(2)(a) states, "[t]he authorized maximum terms of imprisonment for felonies are: (a) For a Class A felony, not less than twenty (20) years nor more than fifty (50) years, or life imprisonment." Neither statute makes any mention of LWOP being a viable option for juvenile offenders. Therefore, had the Movant not been death penalty eligible, he would never have had received the sentence of life without the possibility of parole of which he is currently serving.

CONCLUSION

Society's views on the standards of decency in regards to the appropriate punishment for juvenile offenders has changed dramatically since the jury first sentenced Movant in the instant case. Further, the understanding of the importance of adolescent brain development on the level of culpability that juveniles possess has since been clearly established in the recent Supreme Court decision of Roper v. Simmons. Id. Failing to reconsider these advances in society's understanding of juvenile's brain development and the impact it has on their decision making in Movant's case would deprive Movant of the due process of law as guaranteed under §§ 2 and

11 of the Kentucky Constitution and the 6th and 14th amendments to the United States Constitution and would constitute cruel and unusual punishment in violation of the §17 of the Kentucky Constitution and the 8th Amendment to the United States Constitution. A new sentencing hearing must be granted in this case.

Further, the appropriate range for sentencing juvenile offenders was not established until the Simmons decision. When jury determined, and the Judge upheld, Movant's sentence, the death penalty was still a sentencing option. Had death not been an option and had the Court considered Movant's sentence under the newly-defined appropriate sentencing range, a term of imprisonment for 20-50 years, life, or life without parole for 25 years, the Court would have reached a different sentencing decision than the one imposed, life without the possibility of parole, which is harsher than the statutory maximum.

Failing to hold a new sentencing hearing in this case, in light of the recent holding in Simmons and the evolving standards of decency, would deprive Movant of the due process of law as guaranteed under §§ 2 and 11 of the Kentucky Constitution and the 6th and 14th amendments to the United States Constitution and would constitute cruel and unusual punishment in violation of § 17 of the Kentucky Constitution and the 8th amendment to the United States Constitution.

RELIEF REQUESTED

Because the Court sentenced Movant without giving full consideration to the recently established constitutional factor of adolescent brain development as it relates to culpability and at a time when the sentencing range still included the possibility of death, it is no longer equitable that Movant's sentence have prospective application. Further, the recently decided Simmons decision, and the principles established therein, constitutes an extraordinary reason justifying relief.

WHEREFORE, Movant respectfully requests this Court to grant Movant a new sentencing hearing in which the Court can give full consideration to the impact of adolescent brain development on Movant's culpability and in which the Court can take into account the appropriate sentencing range of a term of imprisonment for 20-50 years, life, or life without parole for 25 years. In the alternative, Movant requests that his sentence be modified to a sentence of 20 years.

Respectfully Submitted,

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NOTICE

Please take notice that the foregoing Motion to Grant New Sentencing Hearing Pursuant to Cr 60.02(e) & (f) and RCr 11.42 was mailed to Pat Howell Goad, Warren Circuit Court Clerk, Justice Center, 1001 Center Street, Bowling Green, Kentucky, 42101 on this the 17th day of February, 2006 to be filed immediately upon receipt and to be heard at a future date mutually agreeable to the Court and both parties.

s/ Dawn Fesmier
Dawn Fesmier

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2006, a true and accurate copy of the foregoing Motion was mailed, via first class postage, to the following: Hon. John R. Grise, Judge, 401 Justice Center, 1001 Center Street, Bowling Green, Kentucky 42101 and Hon. Christopher T. Cohron, Commonwealth Attorney, 205 Justice Center, 1001 Center Street, Bowling Green, Kentucky 42101.

s/ Dawn Fesmier
Dawn Fesmier

Supreme Court, U.S.
FILED
JUN 16 2009
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No. 08-1131

Supreme Court of the United States

SOPHAL PHON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

When a juvenile receives a sentence less than death, does that sentence run afoul of this Court's holding in *Roper v. Simmons?*

II.

When a juvenile has committed capital crimes and is tried as an adult, is a sentence of Life Without Parole (LWOP) cruel and unusal punishment under the Eighth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

The facts and procedural history of this case were summarized by the Kentucky Court of Appeals in *Phon v. Commonwealth*, 51 S.W.3d 456 (Ky.App. 2001) as follows:

> On October 31, 1996, Phon, then sixteen years old[1], was transferred to Warren Circuit Court as a youthful offender. On November 13, 1996, he was indicted on several charges: two counts of murder, first-degree assault, and first-degree robbery and burglary. These charges arose from Phon's execution-style shooting of a Warren County couple and their 12-year-old daughter in their home on August 17, 1996; only the child survived. The Commonwealth sought the death penalty for the two murders charged in the indictment.
>
> Phon was represented by Vincent P. Yustas, an employee of the Department of Public Advocacy (DPA) and a member of its Capital Trial Unit. Phon's mitigation defense was that he was acting under duress or under the domination of twenty-six-year-old Outh Sananikone, one of his four co-defendants and the leader of a gang to which Phon belonged. Phon claimed that he believed that if he did not shoot the victims as ordered by Sananikone, he and his family would be killed in retaliation. Yustas attempted to obtain a severance of Phon's trial from that of his co-defendants but was only partially successful; the trial court denied the request to be severed from Sananikone.
>
> After the crimes had been committed but

prior to Phon's trial which was scheduled to commence on July 6, 1998, the Legislature amended the penalties in KRS 532.030(1)(effective July 15, 1998) to permit the imposition of life without the possibility of parole. The Commonwealth moved the trial court for a ruling preventing application of this new penalty - presumably making the imposition of the death penalty more likely. The trial court denied the motion on July 2, 1998.[1] On July 5, 1998, Phon entered an open-ended guilty plea with no recommendation as to sentencing on any of the charges by the Commonwealth. He also executed a document consenting to the jury's consideration of the penalties in the newly amended KRS 532.030(1). After a two-week sentencing trial, the jury recommended that Phon be sentenced to life without parole for each of the murders and to twenty years for each of the other crimes.

Phon's case has resulted in two published decisions: *Commonwealth v. Phon,* 17 S.W.3d 106 (Ky. 2000)(certification of law as to whether life without parole [LWOP] applied to Phon) and *Phon v. Commonwealth,* 51 S.W.3d 456 (Ky.App. 2001)(affirming the denial of Phon's RCr 11.42 motion). On February 20, 2006, Phon filed a successive post-

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[1]The trial court's ruling was upheld in the motion filed by the Commonwealth for a certification of law. *See Commonwealth v. Phon,* 17 S.W.3d 106 (Ky. 2000).

conviction motion (pursuant to RCr[2] 11.42 and CR[3] 60.02(e) and (f)) seeking a new sentencing hearing in light of the United States Supreme Court decision in *Roper v. Simmons,* 543 U.S. 551 (2005)(finding it unconstitutional to impose a sentence of death for individuals who commit capital crimes while under the age of eighteen). After the Commonwealth responded (and Phon replied), a hearing was held on June 26, 2006 in Warren Circuit Court. In a very well-reasoned Order, the circuit court denied Phon's CR 60.02 motion and

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[2]"RCr" refers to the Kentucky Rules of Criminal Procedure. For reference, the proper post-conviction procedure in Kentucky is explained in *Gross v. Commonwealth*, 648 S.W.2d 853 (1983). By comparison, a motion pursuant to RCr 11.42 to vacate, set aside, or correct sentence is a collateral attack rule similar to 28 U.S.C. § 2255.

[3]"CR" refers to the Kentucky Rules of Civil Procedure. For reference, the proper post-conviction procedure in Kentucky is explained in *Gross v. Commonwealth,* 648 S.W.2d 853 (Ky. 1983). By comparison, a motion pursuant to CR 60.02 is similar to motion under Federal Rule of Civil Procedure 60(b).

declined to extend the holding in *Roper* to Phon's case.[4]

On March 7, 2008, the Kentucky Court of Appeals issued a unanimous Opinion affirming the judgment of the circuit court. *Phon v. Commonwealth,* 2006-CA-002456 [2008 WL 612283] (Ky.App. 2008). In its Opinion, the Court of Appeals, found that the trial court did not abuse its discretion denying Phon's motion. *Slip Opinion*, pg. 8, *citing Sims v. Commonwealth*, 233 S.W.3d 731 (Ky.App. 2007) and *Brady v. United States,* 397 U.S. 742 (1970), the Court of Appeals reasoned that Phon's guilty plea and subsequent jury sentencing to life imprisonment without the possibility of parole did not require a new sentencing hearing for Phon. *Id.* at 4-7. From that basis, the Court of Appeals reiterated that *Roper v. Simmons*, 543 U.S. 551 (2005) only has retroactive application when a sentence of death was imposed on a defendant under the age of eighteen (18) at the time of the offense. *Id.* at 7-8. Phon moved for discretionary review and was denied by the Kentucky Supreme Court on December 10, 2008.

In Phon's petition, it was alleged that he was sixteen (16) when he committed his crimes (two counts of capital murder and first-degree assault). However, it

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[4]Phon's successive RCr 11.42 motion was not addressed by the trial court's Order - as this issue was not properly raised pursuant to that rule. That finding was not specifically appealed and the case was heard in the Kentucky courts as an appeal of the denial of a CR 60.02 motion - which is reviewed for an abuse of discretion. *Gross v. Commonwealth*, 648 S.W.2d 853, (Ky. 1983).

is noteworthy that in the Judgment and Sentence on Plea of Guilty, the trial court found that Phon was seventeen (17) years of age at the time he committed the crimes on August 17, 1996 — as the date of birth in the indictment listed Phon's date of birth as February 12, 1979 (making Phon approximately seventeen and one-half [17½] years of age when he committed these crimes). During testimony, Phon's mother apparently testified that she incorrectly gave immigration officials Phon's birthday and that he was actually born on September 26, 1979. When authoring its opinion in *Phon v. Commonwealth*, 51 S.W.3d 456 (Ky.App. 2001), the Kentucky Court of Appeals apparently incorrectly adopted the later date as Phon's date of birth rather than the age found by the trial court.

REASONS FOR DENYING THE WRIT

I.

PHON'S SENTENCE OF LIFE WITHOUT PAROLE IS NOT AFFECTED BY *ROPER V. SIMMONS*.

In his Petition, Phon has alleged that he is entitled to a new sentencing hearing because his sentence of life without parole (LWOP) was only available due to the fact that he was death-eligible - a sentence that would have been invalidated by *Roper v. Simmons*[5] as cruel and unusual punishment if it had been received. Petition, pgs. 6-22. For the reasons noted herein, Phon's petition should be denied.

Phon has not cited to any authority that *Roper* applies to a case in which the death penalty was not imposed. Indeed, Phon does not point to any case in which a court has determined that this Court's decision in *Roper* should be applied to prohibit life imprisonment involving a juvenile.[6] Rather, those federal courts that have considered the applicability of *Roper* to a juvenile's term of life imprisonment have universally decided that it is inapplicable and irrelevant. *See In re Hill*, 437 F.3d 1080, 1082 at fn. 1 (11th Cir.2006); *United States v. Pete*, 277 Fed. Appx. 730, 734 (9th Cir. 2008); *United*

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[5]543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

States v. Feemster, 483 F.3d 583, 588 (8th Cir. 2007), *vacated on other grounds*, 128 S. Ct. 880 (2008); *United States v. Salahuddin,* 509 F.3d 858 (7th Cir. 2007); *Calderon v. Schribner*, 2009 WL 89279, *4-6 (E.D. Cal. Jan. 12, 2009); *Culpepper v. McDonough,* 2007 WL 2050970, *4-5 (M.D. Fla. July 13, 2007); *Douma v. Workman,* 2007 WL 2331883, *3 (N.D. Okla. 2007); *Pineda v. Leblanc,* 2008 WL 294685, *3 (E.D. La. Jan. 31, 2008); *Schane v. Cain,* 2007 WL 4967081 (W.D.La. 2007); *Sharikas v. Kelly,* 2009 WL 1382604, *2 (E.D.Va. 2009); *Byrd v. Quarterman,* Case No. 3:08cv1414b, 2008 WL 4427265, *2 (N.D. Tex. Sept. 26, 2008); *cf. Smith v. Howes,* 2007 WL 522697, *2 (E.D. Mich. Feb. 14, 2007) (finding *Roper* inapplicable to juvenile sentenced to thirty to sixty years in prison). States courts have similarly been in accord. *See, e.g., People v. Demirdjan,* 50 Cal. Rptr. 3d 184, 186-87 (Cal. App. Ct. 2006); *State v. Allen*, 958 A.2d 1214, 1233-36 (Conn. 2008); *Wallace v. State,* 956 A.2d 630, 638-41 (Del. 2008); *Commonwealth v. Wilson,* 911 A.2d 942 (Pa.Super.

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[6]Phon has relied heavily on *State v. Morgan,* 626 S.E.2d 888 (S.C. 2006). However, in that case, Morgan received the death penalty, therefore, *Roper* invalidated his earlier sentence. That is not the case here. Similarly, reliance on *Shepherd v. Commonwealth,* 251 S.W.3d 309 (Ky. 2008) is misplaced. The *Shepherd* Court concluded that juveniles tried as adults could not be sentenced to LWOP because they are sentenced under KRS 640.040(1) - Kentucky's Youthful Offender Statute. The conclusion of the *Shepherd* Court was based on a matter of state statutory law decided well after Phon's case.

2006); *Culpepper v. State,* 971 So. 2d 259, 260-61 (Fla. 2d DCA 2008); *People v. Griffin,* 857 N.E.2d 889, 899 (Ill. App. Ct. 2006); *Sims v. Commonwealth,* 233 S.W.3d 731, 732-33 (Ky.App. 2007); *State v. Warren,* 887 N.E.2d 1145, 1149 (Ohio 2008); *State v. Rideout,* 933 A.2d 706, 718-19 (Vt. 2007). *See also Cobos v. Dennison,* 825 N.Y.S.2d 332 (N.Y. Sup. Ct., App. Div. 2006); *State v. Avery,* 649 S.E.2d 102, 108 (S.C. Ct. App. 2007). Authority is not split on this issue.

This Court's reasoning in *Roper* was based "in large measure on the 'special force' with which the Eighth Amendment applies when the state imposes the ultimate punishment of death." *United States v. Mays,* 466 F.3d 335, 340 (5th Cir.2006) (*citing Roper*, 543 U.S. at 568-69, 125 S.Ct. 1183). This is so because "the death penalty is different from other punishments in kind rather than degree." *Solem v. Helm,* 463 U.S. 277, 294, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Phon's sentence of life without parole, regardless of the circumstances of its imposition, does not implicate the new constitutional rule announced in *Roper.*

On the contrary, in *Roper,* this Court noted that based on sociological and physiological evidence that persons under the age of eighteen differ from adults in terms of their culpability and moral responsibility. Id. Therefore, it was concluded that an Eighth Amendment violation occurred because "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders." *Roper v. Simmons,* 543 U.S. at 572, 125 S.Ct. 1183. However, this Court also stated that it could not "deny or overlook the brutal crimes too many juvenile offenders have committed," *Id.* Consequently, it held that "when a

juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties", Id. at 574, 125 S.Ct. 1183, and as an alternative to the death penalty gave note to the fact that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* at 572, 125 S.Ct. 1183. It is logical that this Court would not have recognized a sentence of LWOP as an acceptable alternative to death in this context if such a sentence would violate the Eighth Amendment. *See United States v. Feemster,* 483 F.3d 583, 588 (8th Cir.2007)("[a]lthough the execution of a juvenile is impermissible under the [e]ighth and [f]ourteenth [a]mendments [to the federal constitution], sentencing a juvenile to life imprisonment is not") *vacated and remanded on other grounds*, — U.S. —, 128 S.Ct. 880, 169 L.Ed.2d 718 (2008). Thus while the Eighth Amendment affords heightened significance to the "diminished culpability" of juveniles, the reasoning of *Roper* does not extend its constitutional prohibition to the imposition of a life sentence without the possibility of release when the offender is a juvenile.

Also of significance, at the time of Phon's trial, Kentucky had recently enacted legislation that created an LWOP alternative for capital sentencing.[7] Phon

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[7]It is worth noting that pursuant to Kentucky's sentencing scheme, in Phon's case, the jury could have selected lesser sentences even upon finding the aggravating circumstances, e.g., 20 years. KRS 532.025. Kentucky is somewhat unique in that

desired the legislation to have retroactive application to capital crimes committed prior to its enactment and gave his consent (which was required) to the inclusion of LWOP in his sentencing scheme. *Commonwealth v. Phon,* 17 S.W.3d 106, 107-108 (Ky. 2000). The Commonwealth argued against its inclusion and upon a certification of law as to its applicability the Kentucky Supreme Court ruled that Phon was entitled to the LWOP instruction. From that basis, it was held that in accordance with the "unqualified consent of [Phon], a sentence of life without parole may be lawfully imposed for capital crimes committed before July 15, 1998." *Phon I*, at 108. In his concurring opinion, Kentucky Supreme Court Justice William S. Cooper noted that, with respect to Phon's position seeking the LWOP instruction, "[i]f [Phon] is incorrect, then he waived any possible *ex post facto* claim regarding the imposition of a penalty more onerous than life without parole for twenty-five years." *Phon I*, at 109 (Cooper concurring). Justice Cooper's words now ring prophetic, as Phon is procedurally barred from bringing the claim made herein.

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finding an aggravating circumstance does not increase the minimum sentence; as in some other states the finding an aggravating circumstance makes the minimum sentence LWOP.

II

THE SENTENCE OF IMPRISONMENT OF LIFE WITHOUT PAROLE FOR A JUVENILE OFFENDER DOES NOT VIOLATE THE EIGHTH AMENDMENT.

In his petition, Phon has argued that this Court should extend its holding in *Roper v. Simmons*[8] beyond juvenile offenders sentenced to death. Relying on this Court's rationale and reasoning from *Roper,* Phon has contended that juvenile offenders should be ineligible for the sentence of life without the possibility of parole (LWOP) based on the same Eighth Amendment considerations. See Petition, pgs. 22-28. Phon's argument is without merit.

Recently, in *Kennedy v. Louisiana*, — U.S. —, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), when discussing the distinction between intentional first-degree murder and non-homicide crimes against individual persons, this Court noted that "the latter crimes may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' they cannot compare to murder in their 'severity and irrevocability.'" 128 S.Ct. 2641, 2644. Indeed, there can be no crime more grave and final then murder. Preservation and protection of human life has always been of paramount importance in all civilized societies. It is for that reason, upon the finding of an aggravating

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[8]543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

circumstance beyond a reasonable doubt, guilty defendants in Kentucky may be sentenced to death. K.R.S. 507.020; 532.025.

The State's power to impose death on convicted capital murders is not unlimited. The Eighth Amendment of the United States Constitution, which is applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment has been interpreted to prohibit punishments that are disproportionate to the crime or are excessive. *Atkins v. Virginia,* 536 U.S. 304, 311, n. 7, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Proportionality determinations require an examination of "evolving standards of decency that mark the progress of a maturing society" in deciding a punishment's constitutionality. *Trop v. Dulles,* 356 U.S. 86, 99, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). Assessing evolving standards of decency under the proportionality review initially requires "objective evidence of the country's present judgment concerning the acceptability of [a given punishment] as a penalty for [the crime being tried]." *Coker v. Georgia,* 433 U.S. 584, 593, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). *See also Roper v. Simmons,* 543 U.S. at 563, 125 S.Ct. 1183 ("sufficient evidence at present of a national consensus."). Objective indicia of society's standards may be found in legislative enactments. *See Roper v. Simmons,* 543 U.S. at 564-68, 125 S.Ct. 1183; *Atkins v. Virginia,* 536 U.S. at 313-17, 122 S.Ct. 2242. The aforementioned considerations have caused this Court to exempt juveniles (*Roper*) and the mentally retarded (*Atkins*)

from eligibility for capital punishment.

Every state provides some mechanism for the imposition of adult sentences on a juvenile offender for certain types of crimes. In those jurisdictions, there is no evident trend away from imposing serious adult criminal liability upon juvenile offenders. According to a recent survey by the Delaware Supreme Court, forty-two (42) states permit juvenile murderers over 14 and less than 18 years old to be sentenced to life without parole (and forty-nine [49] provide for an adult disposition for intentional murder by this same juvenile group). *Wallace v. State,* 956 A.2d 630, 640 (Del. 2008); *also see*, *State v. Allen,* 958 A.2d 1214, 1233-1236 (Conn. 2008). In twenty-seven of those states, the LWOP sentence is mandatory for anyone, child or adult, found guilty of intentional murder. Id. In the past twenty (20) years courts have consistently rejected Eighth Amendment claims made by juvenile murderers attacking their life sentences. *State v. Allen,* 958 A.2d at 583. *See also Solem v. Helm,* 463 U.S. 277, 290 n. 15, 103 S.Ct. 3001, 3009 n. 15, 77 L.Ed.2d 637 (1983) ("no sentence of imprisonment would be disproportionate" to felony murder).

As noted in Argument I herein, in *Roper,* this Court limited its holding to juveniles sentenced to death. *Roper v. Simmons,* 543 U.S. at 566, 125 S.Ct. 1183. In that opinion, this Court noted that the punishment of life imprisonment without the possibility of parole as a constitutionally viable outcome. *Id.* at 572, 125 S.Ct. 1183. This Court would not have recognized a sentence of LWOP as an acceptable alternative to death in this context if such a sentence would violate the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to deny the petition for writ of *certiorari*.

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SOPHAL PHON,
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Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. PETITIONER, A JUVENILE UNDER THE AGE OF 18 AT THE TIME OF HIS OFFENSE, IS ENTITLED TO A NEW SENTENCING HEARING IN LIGHT OF *ROPER V. SIMMONS* BECAUSE HIS LIFE WITHOUT PAROLE SENTENCE WAS AVAILABLE ONLY AS A MITIGATING SENTENCE FOR THE DEATH PENALTY.

In its Brief in Opposition, Respondent rests its argument on the hope that the reasoning and holding of *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) should apply only to cases in which the state actually imposed the sentence of death for an individual who committed an offense while a juvenile. This understates the scope and significance of *Roper.*

Roper did not merely deal with the death penalty, but rather, recognized the scientifically established "differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper,* 543 U.S. at 569. These general differences – the lack of maturity and underdeveloped sense of responsibility that often results in impetuous and ill-considered actions and decisions, the increased vulnerability to negative influences and pressures, and yet unformed character of a juvenile, all apply to a sentence of life without the possibility of parole as well as to a sentence of death.

Respondent's desire to apply *Roper* only to juveniles who were sentenced to death would create

a bizarre and inequitable sentence for Phon compared to other juveniles spared from the death penalty in Kentucky by *Roper*. All of those sentenced to death were resentenced to a term of years that allowed for parole. Only Phon, who a jury determined merited a sentence less than the death sentence imposed in the other cases, remains sentenced to die in prison. Kentucky's refusal to resentence Phon in light of *Roper*, when the Commonwealth did resentence all those sentenced to death for crimes committed while juveniles violates the basic tenets of equal protection under law.

Respondent's claim that Phon waived this issue is without merit, as well, as the Constitutional right established in *Roper* was not available to Phon until when *Roper* was decided, well after any purported waiver by Phon. Phon could not have intelligently waived a Constitutional right of which he was not aware.

II. THE SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FOR JUVENILES UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.

Respondent's claim that there is no evident trend away from imposing life without parole sentences on juveniles is without merit. Respondent's suggestion ignores the now uniform international condemnation of sentencing juveniles to die in prison and a quickly growing national consensus recognizing the inhumanity of this sentence for crimes committed while a juvenile.

In *Roper* this Court affirmed the propriety of referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" 543 U.S. at 575. The international consensus against sentencing juveniles to life without parole is overwhelming. The United States is the only country in the world to condone life without parole sentences for juveniles under the age of eighteen at the time of the crime. *See* Michelle Leighton & Constance de la Vega, Ctr. For Law & Global Justices, Univ. S.F. Law Sch., *Sentencing Our Children to Die in Prison: Global Law and Practice* 4, 9-12 (2007) *available at* http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf. For years, the United States has been the only country to regularly allow this sentence to be imposed on juveniles. Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 21, 26 (2005) *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf. Additionally, as noted in the instant petition for certiorari, the United Nations Convention on the Rights of the Child prohibits life without parole sentences for offenders under the age of eighteen. This Court previously recognized the value of this international covenant in demonstrating the international consensus against the death penalty for juveniles and while not controlling provides "respected and significant confirmation" of the Court's conclusions. *Roper*, 543 U.S. at 577-78. Similarly, the European

Court of Human Rights has concluded that life without parole for offenders under the age of eighteen violates Article 3 of European Convention, which prohibits "inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

Contrary to Respondent's claim, there is also a growing national trend against life without parole for juveniles. This Court has granted certiorari in *Graham v. Florida* and *Sullivan v. Florida* to address the rare occasion that a juvenile is sentenced for life without parole for a non-homicide offense. Numerous states have prohibited the imposition of juvenile life without parole for both homicide and non-homicide crimes. *People v. Miller*, 781 N.E.2d 300, 302-308 (Ill. 2002)(life without parole for fifteen-year-old who committed multiple murders violates Illinois constitution); *Naovarath v. State*, 779 P.2d 944, 945-49 (Nev. 1989)(life without parole for thirteen-year-old convicted of murder violates federal and state constitutions); *People v. Dillon*, 668 P.2d 697, 726-27 (Cal. 1983)(life without parole for seventeen-year-old convicted of felony murder is cruel and unusual punishment). *In re Nuñez*, (Super. Ct. No. 02ZF0021)(Cal. Super Ct. 2009)(life without parole sentence for juvenile convicted off kidnapping for ransom is cruel and unusual punishment in violation of state and federal constitutions).

The list of state legislatures that forbid life without parole for crimes committed by juveniles continues to grow. Since the filing of the instant petition for certiorari, Texas can be added to the list

of nine states and the District of Columbia that view juvenile life without parole with increasing disfavor. On June 19, 2009, the Texas governor signed SB 839, an act to prohibit juvenile life without parole for anyone under the age of seventeen at the time of the crime. CITE Texas Penal Code § 12.31 (as amended, effective September 1, 2009).

This list of states includes Phon's sentencing state of Kentucky. The Kentucky Supreme Court recently held that life without parole is not a permissible sentence under Kentucky's sentencing scheme for juveniles tried as adults. *Shepherd v. Commonwealth,* 251 S.W.3d 309 (2008). Rather than recognizing the impropriety of Phon's sentence, Respondent has elected to attempt to distinguish the *Shepherd* rule from Phon's situation because "the conclusion of the *Shepherd* Court was based on a matter of state statutory law decided well after Phon's case." Brief in Opposition, p. 7. This argument exposes the growing national consensus against sentencing juveniles to die in prison.

This trend against imposing this extremely serious penalty on juveniles, like the trend against sentencing juveniles to death, should "carr[y] special force in light of the general popularity of anticrime legislation,...[and] the particular trend in recent years toward cracking down on juvenile crime in other respects." *Roper,* 543 U.S. at 566.

CONCLUSION

This Court has granted certiorari in two cases in which juveniles received sentences of life without parole for non-homicide crimes. Despite Respondent's

argument that death is different, the *Roper* decision was based primarily upon the categorically diminished culpability of juveniles under the age of eighteen. This Court should grant certiorari here to determine whether this reasoning applies to the "penultimate sentence" as well as the death penalty.

Alternatively, Petitioner respectfully requests the Court stay the proceedings in this matter until its decision in *Graham v. Florida* and *Sullivan v. Florida*.

Respectfully submitted,

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(2)

Supreme Court, U.S.
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No. 08-1501

In the Supreme Court of the United States

LEWIS FERGUSON, ET AL., PETITIONERS

v.

UNITED STATES PATENT AND TRADEMARK OFFICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether petitioners' claimed method and "paradigm" for marketing software products are eligible for federal patent protection.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 558 F.3d 1359. The opinions of the Board of Patent Appeals and Interferences (C.A. App. 1-27, C.A. App. 30-64; Pet. App. 20-26) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2009. The petition for a writ of certiorari was filed on June 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a decision of the United States Patent and Trademark Office (PTO) rejecting all claims in petitioners' patent application, Serial No. 09/387,823, for lack of patentable subject matter under 35 U.S.C.

101. Pet. App. 1. The court of appeals affirmed. *Id.* at 1-14.

1. The Patent Clause of the Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to * * * Inventors the exclusive Right to their * * * Discoveries." U.S. Const. Art. 1, § 8, Cl. 8. Congress exercised that authority in enacting the Patent Act, 35 U.S.C. 1 *et seq.* Section 101 of the Act identifies the types of inventions that are eligible for patent protection:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C. 101.

Although this provision is broad in scope, see *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980), it imposes several limitations on the subject matter eligible for federal patent protection. *Id.* at 309. "[N]o patent is available for a discovery, however useful, novel, and nonobvious, unless it falls within one of the express categories of patentable subject matter of 35 U.S.C. § 101." *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 483 (1974). By "bring[ing] certain types of invention and discovery within the scope of patentability while excluding others," the Patent Act "seeks to avoid the dangers of overprotection just as surely as it seeks to avoid the diminished incentive to invent that underprotection can threaten." *Laboratory Corp. of Am. Holdings* v. *Metabolite Labs., Inc.*, 548 U.S. 124, 127 (2006) (Breyer, J., dissenting from dismissal of writ of certiorari).

2. Petitioners' patent application, entitled "A New Paradigm For Bringing New Products To Market," C.A. Supp. App. A401, seeks to patent a business plan in which a dedicated marketing company sells products, such as software, on behalf of other companies in exchange for a share of the profits. The application sets forth 68 claims, including both method claims and claims directed to what petitioners call a "paradigm." Pet. App. 2. Claim 1, which the court of appeals identified as representative of petitioners' method claims, seeks patent protection for the following "method":

> A method of marketing a product, comprising:
>
> developing a shared marketing force, said shared marketing force including at least marketing channels, which enable marketing a number of related products;
>
> using said shared marketing force to market a plurality of different products that are made by a plurality of different autonomous producing compan[ies], so that different autonomous companies, having different ownerships, respectively produce said related products;
>
> obtaining a share of total profits from each of said plurality of different autonomous producing companies in return for said using; and obtaining an exclusive right to market each of said plurality of products in return for said using.

Id. at 2-3.

Claim 24, representative of petitioners' "paradigm" claims, seeks patent protection for the following "paradigm":

> A paradigm for marketing software, comprising:
>
> a marketing company that markets software from a plurality of different independent and autonomous software companies, and carries out and pays for operations associated with marketing of software for all of said different independent and autonomous software companies, in return for a contingent share of a total income stream from marketing of the software from all of said software companies, while allowing all of said software companies to retain their autonomy.

Pet. App. 3.

3. The PTO examiner rejected all 68 claims on a variety of grounds, including for lack of novelty and for obviousness. Pet. App. 3. The PTO's Board of Patent Appeals and Interferences (Board) vacated the examiner's decision and entered a new rejection under 35 U.S.C. 101 for lack of patentable subject matter. Pet. App. 3-4; see C.A. App. 1-27.

On petitioners' request for rehearing, the Board issued a new rejection under Section 101, elaborating upon and clarifying its earlier conclusions. Pet. App. 4; see C.A. App. 30-64. The Board explained that, although it considered petitioners' method claims to be nominally directed to statutory subject matter (*i.e.*, a "process"), the claims were not eligible for patent protection because they "only relate to humans buying and selling products and rights and entering into agreements for such buying and selling." *Id.* at 36. In addition, the Board held, the method claims were directed to the "ab-

stract idea" of shared marketing, and those claims would impermissibly preempt any application of that idea by others. *Id.* at 38. The Board likewise rejected petitioners' "paradigm" claims, emphasizing that a "paradigm" is an unpatentable abstraction rather than a process, machine, manufacture, or composition of matter eligible for protection under Section 101. Pet. App. 5; C.A. App. 34. Petitioners filed another request for rehearing, but the Board declined to modify its decision. Pet. App. 5; see *id.* at 20-26 (Board opinion).

4. The court of appeals affirmed. Pet. App. 1-19. With respect to petitioners' method claims, the court concluded that its recent decision in *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (en banc), cert. granted, 129 S. Ct. 2735 (2009) (*Bilski*), was "dispositive." Pet. App. 7-8. The court explained that, under *Bilski*, a method or process is patentable only if it "is tied to a particular machine or apparatus" or "transforms a particular article into a different state or thing." *Id.* at 8 (quoting *Bilski*, 545 F.3d at 954). The court of appeals further explained that petitioners' method claims are unpatentable because they "fail to meet either prong of the machine-or-transformation test." *Id.* at 9. The court observed that "[a] marketing force is not a machine or apparatus," *id.* at 8, and that nothing is transformed by the claimed methods other than intangible "business or legal relationships," *id.* at 9 (citing *Bilski*, 545 F.3d at 963). The court also rejected petitioners' proposed alternative test for patentability—whether the claimed subject matter "has more than a scintilla of interaction with the real world in a specific way," *id.* at 10—on the ground that the test is both unclear and inconsistent with prior decisions of this Court and the court of appeals. *Id.* at 11.

The court of appeals also affirmed the Board's conclusion that petitioners' "paradigm" claims fall outside the enumerated categories of patent-eligible subject matter. Pet. App. 12-13. In particular, the court rejected petitioners' argument that a software marketing company "is a physical thing, and as such analogous to a machine." *Id.* at 13. The court concluded that "[a]pplicants' paradigm claims are drawn quite literally to the 'paradigmatic "abstract idea,"'" *id.* at 14 (quoting *In re Warmerdam*, 33 F.3d 1354, 1360 (Fed. Cir. 1994)), and are consequently ineligible for patent protection.

Judge Newman concurred in the judgment. Pet. App. 15-19. She would have held that petitioners' claims were properly rejected by the PTO examiner as obvious under 35 U.S.C. 103. Pet. App. 19.

DISCUSSION

In affirming the decision of the PTO's Board of Patent Appeals and Interferences that petitioners' claimed invention—in effect, a business plan for marketing software products—is not eligible for patent protection under 35 U.S.C. 101, the court of appeals relied on its decision in *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (en banc). This Court recently granted a petition for a writ of certiorari to review the Federal Circuit's decision in *Bilski*. See *Bilski*, cert. granted, 129 S. Ct. 2735 (2009) (No. 08-964). The petitioners in *Bilski* contend that the Federal Circuit erred in holding that a claimed "process" must be "tied to a particular machine or apparatus, or transform an article into a different state or thing," in order to be eligible for patent protection under Section 101. Pet. at i, *Bilski*, *supra* (No. 08-964).

Because petitioners here likewise challenge the propriety of the Federal Circuit's "machine-or-transforma-

tion" test for patentability, particularly as it applies to business methods, the Court's decision in *Bilski* may shed light on the proper resolution of this case. The Court should therefore hold the petition pending its disposition of *Bilski*.*

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Bilski* v. *Doll*, No. 08-964, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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AUGUST 2009

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* The PTO also rejected petitioners' claims on the alternative ground that all of those claims were directed to an unpatentable abstract idea. C.A. App. 38; see Pet. App. 22. The court of appeals did not address that ground for rejecting petitioners' claims. If the Court ultimately determines that this case should be remanded to the court of appeals for further proceedings in light of the Court's decision in *Bilski*, the court of appeals could consider that issue on remand.